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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

Nos. 48 and 64

UNIVERSAL OIL PRODUCTS COMPANY,
Petitioner,

vs.

ROOT REFINING COMPANY,
Respondent.

RESPONDENTS' BRIEF

J. BERNHARD THIESS,
THORLEY VON HOLST,
pro se, and on behalf of
Skelly Oil Company,
Globe Oil & Refining Company (of Illinois),
Eldorado Refining Company,
Globe Oil & Refining Company (of Kansas),
Rock Island Refining Company, and
Anderson Prichard Oil Company.

SIDNEY NEUMAN,
ROBERT W. POORE,
Of Counsel.

HAMMERSMITH-KORTMEYER CO. MILWAUKEE

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RESPONDENTS' BRIEF.

The Opinion Below.

The opinion of the Circuit Court of Appeals, filed December 29, 1944, to review which this Court granted certiorari, is reported at 147 F. (2d) 259, and will also be found in the record beginning at page 3685 of Volume IX. This opinion was rendered on the motion of respondents to tax as costs against petitioner the fees and expenses incurred by them and by the late Arthur C. Denison, as *amici curiae*, in uncovering and presenting evidence respecting an issue of fraud and corruption arising in the above-entitled cause. The motion was granted, the sum allowed totaling $154,606.57.

In a previous order, to-wit, that of June 15, 1944 (reported in 62 U.S.P.Q. 114, and found in Vol. IX of

the record herein at page 3661*), the Court of Appeals had unanimously adopted the report (VIII, 3516-3600) of a special master finding that the judgments on appeal in this cause, rendered on June 26, 1935, were void because tainted with fraud and corruption, and had vacated these fraudulently induced judgments. Petitioner neither requested the Court of Appeals for a rehearing, nor petitioned this Court for review by certiorari or otherwise, of the adjudication of fraud or of the question of "due process" in the proceedings which culminated in that adjudication. Petitioner only sought aid of this Court from the subsequent money judgment of December 29, 1944.

The Questions Presented.

The questions presented here are whether the Court of Appeals had power to enter the order of December 29, 1944, whereby fees and costs were assessed against petitioner; whether the Court had jurisdiction of the proceedings which led up to the entry of that order; whether the question of due process in the proceedings whereby fraud was established is properly before this Court, and, assuming that it is, whether petitioner was deprived of due process.

STATEMENT OF THE CASE

The Parties.

Universal Oil Products Company,† petitioner herein, is, and always has been, a patent holding and licensing company, dealing in patents in the petroleum and re-

*Hereafter we abreviate citations to the record by denoting the volume with Roman, and the page with Arabic, numerals.

† Hereinafter sometimes called "Universal."

fining industry. During the period here in question, from about 1927 down to the present time, petitioner has always owned many hundreds of patents — in 1935 over twelve hundred. Its patent licensing business was built around the work of one Carbon P. Dubbs, and the process embodying the teachings of his patents was widely advertised by petitioner as the "Dubbs Cracking Process." (See *Universal Oil Products Co. v. Globe Oil & Refining Co.*, 40 F. Supp. 575, 579.) Most important of all the patents owned by petitioner from 1929 to the time of its expiration in 1938 was No. 1,392,629, issued in 1921 to Carbon P. Dubbs (I, 19). This patent, and No. 1,537,593, issued in 1925 to one Gustav Egloff—alleged to show an improvement over the Dubbs patent—were before this Court in *Universal Oil Products Company v. Globe Oil & Refining Company*, 322 U.S. 471, (decided May 29, 1944), wherein the Dubbs patent was held not infringed, and the Egloff patent, invalid.

Many millions of dollars in royalties have been collected by Universal chiefly in tribute to the Dubbs patent (I, 19) and largely as the result of its having been sustained and given a wide scope by the Court of Appeals for the Third Circuit in the case at bar* in 1935 (78 F. 2d. 991).

From 1931 to the fall of 1944 petitioner's stock was held by the Royal Dutch Shell group, the Standard Oil Company of California, and the Atlantic Refining Company. After the fact of petitioner's fraud in the *Root* case had been established by the Court of Appeals' decision of June 15, 1944, these stockholders conveyed all their interests in petitioner to The Guaranty Trust Company as Trustee for the American Chemical Society.

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* Hereinafter called the "*Root*" case.

Respondents are Root Petroleum Company,* which, however, for reasons hereinafter explained, is taking no part in these proceedings, and J. Bernhard Thiess and Thorley von Holst, attorneys at law, who appear because of their status as *amici curiae* appointed by the Court of Appeals in the fraud investigation before that court. They also appear here, as they did in the Court of Appeals, on behalf of certain independent oil refining companies against whom the Root judgments had been asserted as *res judicata* and as judicial precedents. The said *amici curiae*, with Arthur C. Denison, Esq., of Cleveland, Ohio, who before his death in 1942 was one of them, had represented Root in this case both in the District Court and on appeal. They ceased to represent Root when, in ignorance of the fraud, it took a license from petitioner in 1939. They had also represented Skelly Oil Company, the Globe Oil & Refining Companies,† Eldorado Refining Company, Rock Island Refining Company, and Anderson-Prichard Oil Company, independent oil refiners against each of which petitioner had brought suits for infringement of the same Dubbs and Egloff patents which were adjudicated in the *Root* case. All these refiners, as well as Root, had installed the Winkler-Koch cracking still. This still, and the Winkler-Koch cracking process, neither of which was patented, were finally freed of the charge of infringement of the Dubbs and Egloff patents by this Court's decision in *Universal v. Globe*, 322 U.S. 471.

History of the Root Litigation.

Universal Oil Products Company filed its bills of complaint against Root Refining Company on the Egloff patent in 1929 and on the Dubbs patent in 1931. The

* Formerly Root Refining Company, hereinafter called "Root."

† Two corporations—one of Illinois, and the other of Kansas.

causes of action were consolidated for trial and were tried before District Judge Nields at Wilmington, Delaware, in the summer of 1932. The interlocutory decrees were for the plaintiff. The defendant appealed and, on June 26, 1935, the Court of Appeals for the Third Circuit, then consisting of Judges J. Warren Davis, Joseph Buffington, and J. Whitaker Thompson, in an opinion written by Judge Davis, affirmed the district court decisions.

It is now established that the decisions of the Court of Appeals were null and void because obtained by Universal's bribery of Judge Davis, but no suspicion of fraud attached to them at the time.

A petition for rehearing was filed and denied without opinion, following which a petition for certiorari was filed with this Court. The petition was denied on October 21, 1935 (296 U.S. 626). Thereafter the mandates of the Court of Appeals went down, and accounting proceedings were initiated. While the accounting was pending, and in ignorance of the fraud which petitioner had perpetrated, Root, on April 1, 1939, took a license from Universal under all its patents including those to Dubbs and Egloff. By the terms of the agreement Root also settled for past infringement. The contract at first provided that a decree of dismissal should be entered, but at Universal's request this was modified to provide that neither Root nor Universal should take further action without the written consent of the other (I, 31). One of Universal's purposes in changing the terms of the agreement to prevent the dismissal of the case was to keep it alive (I, 19) so that the coercive power of the injunction, awarded by the decree, could be invoked by Universal in the event that Root should default in its payment of royalties due under the license (I, 27).

Meanwhile Universal had filed suits for infringement of the Dubbs and Egloff patents against other users of Winkler-Koch stills, and in all of these suits had pleaded the Court of Appeals' decision in the *Root* case as a judicial precedent, and, in all but one of them, as *res judicata*, against each defendant, on the theory that all had participated in, and had controlled, the defense of the *Root* case. One of these other cases which came on for trial was that against the Globe Oil & Refining Co. in the United States District Court sitting in Chicago. In that case the court had ordered that a preliminary hearing be had on the issue of *res judicata* and in April, 1939, had decided this question in favor of the plaintiff (27 F. Supp. 161). However, on petition for rehearing, and on a showing that Root had settled its case with Universal, the court vacated its prior holding and decided that Globe was no longer bound by the *Root* judgments (31 F. Supp. 665). The court did not, however, modify its former view that Globe, together with the other users of the Winkler-Koch still, had participated in, and controlled the defense of, the *Root* case. That question was subject to review on appeal of the *Globe* case after the other issues involved therein should have been decided.

Subsequently, and before the decision of the District Court on the merits in the *Globe* case, counsel for Globe and other users of Winkler-Koch stills, learned (in May, 1941) of facts, developed at the first criminal trial in Philadelphia of Judge J. Warren Davis and one Morgan S. Kaufman, on the charge of conspiracy to obstruct justice in the William Fox bankruptcy cases (I, 9-10), which suggested the possibility of fraud in the *Root* case. Root was thereupon approached with the suggestion that it initiate proceedings in its case to discover these facts, but its position in the matter was that, having taken a license on

favorable terms, it was unwilling to take any action which might jeopardize that license (I, 8). Accordingly, counsel for the other defendants then being sued on the Dubbs and Egloff patents, and against which the *Root* judgments were being asserted as *res judicata* and as precedents, appeared on June 5, 1941, on notice to petitioner (I, 2), in an informal oral presentation before the Circuit Court of Appeals. The notice stated that their appearance would be (I, 3) "on behalf of certain companies, including Globe Oil & Refining Company and Skelly Oil Company against whom the decision in the said case of *Root Refining Company v. Universal Oil Products Company* is being asserted as *res judicata* and as a judicial precedent." At the hearing of June 5, 1941, these counsel suggested to the court the reasons which seemed to them to require an investigation into whether the judgments in the *Root* case were void because tainted with fraud (I, 1-28). Universal's counsel then and there suggested as an alternative to the proposed investigation that there be a reargument of the case before the Court of Appeals on the existing record and briefs (I, 19), with the understanding that if, on the reargument, the decision went the same way as before, Root would nonetheless be confirmed in its settlement (I, 25-6). This offer was never accepted by Root.

At the close of the hearing of June 5, 1941, the Court suggested that a formal petition be filed, perhaps in form of a presentation *amicus curiae*, in order that "the whole matter may be one of record in which the Court may determine the issue" (I, 27).

Accordingly, on June 20, 1941, Messrs. Denison, Thiess and von Holst, filed such a petition with the Court of Appeals. In the petition they stated their interest to be dual, as officers of the Court in the public interest, and

also as attorneys for their other clients against whom the *Root* judgments had been asserted as precedents and as binding adjudications (I, 30). In this petition the jurisdiction of the Court was said to rest (I, 30) "upon the inherent power of the Court at any time to examine into the suggested existence of fraud and corruption affecting and tainting any former action of such Court.".

In reciting the history of the *Root* case, the petition specifically stated (I, 31) that the case was still formally pending in the District Court of Delaware pursuant to the agreement of the record parties that it would not be dismissed save with the written consent of both. The petition also set forth the assertion of the *Root* judgments as precedents and as binding adjudications against other named defendants in other suits brought by Universal on the Dubbs and Egloff patents, and the facts upon which it was charged that the judgments were fraudulent (I, 31-46). The petition prayed, *inter alia*, that the Court make request of the Department of Justice for any records it might have on the question "whether there was such fraud, corruption, obstruction or distortion of justice as tainted and invalidated the decrees" in the *Root* case, and that a special master be appointed with appropriate powers to obtain such records, to examine into that question and to report his findings and conclusions to the Court. The petition also prayed for such other relief either in the Court's interest, or for the benefit and relief of the petitioners in respect of their collateral interests, as to the Court should seem meet and proper.

Universal made answer (I, 61-71) denying the existence of any fraud and seeking to explain the incriminating facts set forth in the petition. With respect to the lack of finality of the case in the District Court the answer admitted the agreement not to dismiss, and said "that said

causes, as alleged in said petition, are still pending in the United States District Court for the District of Delaware."

On November 26, 1941, the Court of Appeals entered its order (I, 94-6) on the petition, appointing Thomas Raeburn White, Esq., of Philadelphia, Special Master, with appropriate powers to conduct hearings in accordance with regular judicial procedure into the question of whether there existed such fraud "as tainted and invalidated" the judgments of June 26, 1935.

Shortly thereafter hearings were begun which continued at intervals until the final hearing of April 2, 1943. All were attended by petitioner's counsel. Thirty-two witnesses, including the principals, the late J. Warren Davis, Morgan S. Kaufman and petitioner's President, the late Hiram J. Halle, were called and examined* by *amici curiae* with the right of cross-examination extended to petitioner's counsel—a right which they freely exercised. Petitioner elected to call no witnesses although it had the privilege of so doing. The record made at these hearings comprised over four thousand typewritten pages. Two hundred and eighty-eight exhibits were admitted in evidence. The Master heard objections to evidence and ruled on them. The hearings were conducted as regular judicial proceedings. At their close both sides to the controversy filed briefs and submitted proposed findings of fact and conclusions of law. Oral argument was waived and on October 19, 1943, the Master filed his report (VIII, 3516-3600) wherein he found that the judgments of the Court of Appeals entered on June 26, 1935, were fraudulently obtained by petitioner through the bribery of Judge Davis, then a member of that Court.

* The testimony of five additional witnesses was stipulated into the record (IV, 1513-17; V, 1899).

Although petitioner filed one hundred and sixty-five objections and exceptions to the Master's Report, in not one of them did it complain that it had in any way been deprived of a fair trial, or that its rights had been determined without due process of law (VIII, 3615-3637).

On June 15, 1944, following briefs and argument, the Court of Appeals entered its order adopting the Master's findings and conclusions, ordering that the judgments of June 26, 1935, be vacated, and recalling the mandates issued on October 30, 1935, to the District Court. The Court also directed the Clerk to restore the causes to the argument list for reargument—apparently to effect their eventual disposition.

Shortly after the entry of this order, Universal and Root, on July 28, 1944, entered into an agreement finally settling all controversies between them. This agreement is Exhibit C to an affidavit of Phillip D. Hamilton, President of Root Petroleum Company, said affidavit being filed herewith and set forth in the Appendix to this Brief. The agreement shows that Universal paid Root $32,298.38 (this being the amount which, by the agreement of April 1, 1939, Root had paid Universal for past infringement of the Dubbs and Egloff patents) and released Root from all claims and demands which had accrued to Universal under the terms of the previous agreement including Root's past due royalty liability of approximately $317,000.00 (*post.*, Appendix p. v). Root agreed that Universal might retain $69,819.06 which Root had already paid Universal as royalties under the 1939 agreement, and released Universal of all claims "of every nature and kind whatsoever, either in law or in equity, from the beginning of the world to the date of these presents"; which, of course, included Root's cause of ac-

tion against Universal arising out of the latter's fraud in bribing Judge Davis.

On or about July 24, 1944, Messrs. Thiess and von Holst presented to the Court of Appeals their motion for the allowance of fees and expenses incurred in uncovering the fraud, in presenting the proofs and briefing the case before the Master, and in briefing and arguing it before the Court of Appeals. The motion was supported by affidavits itemizing the amount of time spent and the expenses incurred in the proceedings (IX, 3666-3684). The entire expense had been defrayed in the first instance by the oil refining companies which had instigated the proceedings in 1941. These companies will be reimbursed should the Court of Appeals order be affirmed by this Court.

On December 29, 1944, the Court of Appeals entered an order allowing $100,000.00 as compensation for services and $54,606.57 as expenses. It was from this order alone that Universal petitioned this Court for certiorari.

On January 9, 1945, in view of Root's final settlement of July 28, 1944, *amici curiae* suggested to the Court of Appeals a form of mandate dismissing the causes in the District Court on the ground that they had become moot. On January 17, 1945, the Clerk of the Court in a letter to counsel stated that the court felt that "it might be appropriate to direct the court below to dismiss the complaints on the ground that the plaintiff came into this court with unclean hands."

This was the status of the case when certiorari was applied for and granted.

The Facts As to Due Process.—With respect to petitioner's contention (Br. pp. 38-46) that it was deprived of its

property without due process of law in the proceedings which led to the determination of its guilt, the following facts are pertinent:

When the petition *amici curiae* was filed, only enough to create a strong suspicion was known of the transactions between Universal, Judge Davis, and Kaufman (Petition, I, 33-42). Hence, the first step taken looked toward discovery of whatever information might have been previously developed by the Department of Justice.

At the first hearing before Thomas Raeburn White, Master, at Philadelphia, on December 11, 1941 (I, 97-101), Universal being then and there represented by counsel (Messrs. O'Mara and Morris), the Master stated that it was suggested by Judge Denison for *amici curiae* (I, 100) "that the Master should procure the papers which the order indicates should be made available to him" and that they should be open to the inspection of *amici curiae*. The following colloquy then transpired (I, 100):

> "The Master: . . . Have you gentlemen anything to say about that?
>
> "Mr. O'Mara: Nothing excepting that it seems to me if they are made available for the inspection of *amici curiae* they should also be made available for the inspection of counsel for the Universal Oil Products Company.
>
> "Mr. von Holst: To which we agree."

The suggestion was then made by *amici curiae* and adopted by the Master, that he obtain from the office of the Attorney General the records of the Grand Jury proceedings at New York and Philadelphia leading up to the indictments of Davis, Kaufman and Fox, the reports of the Federal Bureau of Investigation, and the statements of witnesses taken by the Attorney General, and as they

might disclose facts pertinent to the subject matter of the proceedings. No objection to this proposal was made by petitioner's counsel. The Master thereupon (I, 102) spent several days in New York going over records and testimony in the office of Walter H. Gahagan, Assistant United States Attorney for the Southern District of New York, and examining a great mass of papers and many exhibits. He borrowed those documents which he considered material from Mr. Gahagan, *and submitted them for the inspection of counsel on both sides on January 19, 1942* (I, 102-109). Among the papers thus submitted (I, 104) was the New York Grand Jury testimony of Charles L. Stokley which is reproduced in the record beginning at page 2306, Volume VI, and concerning which petitioner's brief complains (pp. 21, 40-41) that it was transmitted by the Master with his report to the court (see Master's Report, VIII, 3518-9), thereby wrongly intimating that it had not previously been submitted to the inspection of petitioner's counsel.

Following upon the inspection of documents on January 19, 1942, *amici curiae* requested the Master to obtain, if he could, additional specified records (I, 109, 114) and accordingly he made a second visit to Mr. Gahagan and, on March 19, 1942, submitted to counsel on both sides a memorandum prepared by him in which he listed and discussed the various additional items and documents which he had been requested to obtain. In some instances the documents requested were submitted for inspection, but in others, they were not, because the Master reported that they contained nothing significant. This second memorandum also included extracts of the New York Grand Jury testimony of Morgan S. Kaufman and J. Warren Davis, interspersed with the Master's summary of testimony not excerpted. This memorandum is repro-

duced in the record beginning at page 2240, Vol. VI. Its transmission to the court with the Master's Report is likewise complained of in petitioner's Brief (pp. 21, 41) with the same false intimation.

At the second hearing on April 16, 1942, the Master read into the record a list of the documents which, on January 19, 1942, had been made available for inspection to counsel on both sides, as a result of his first search (I, 102-109). Pointing out that *amici curiae* had requested a further search (I, 109, 114), the Master reported that he had made his second visit, and he then read into the record, with some additions, the aforesaid memorandum which he had prepared as the result of this second visit, and which had been already inspected and examined by counsel on March 19, 1942, omitting, however, the extracts of the New York Grand Jury testimony of Morgan S. Kaufman and J. Warren Davis (I, 109-113). Having done this, the Master stated (I, 113):

> "Counsel on both sides, as I understand it, have examined all this material to the extent which they care to do so at this time."

Petitioner conceded that the documents in the possession of the Master were "true and accurate documents" covering what they purported to cover (I, 137-8). With the exception of unsworn statements of F.B.I. agents, petitioner's counsel stipulated "the accuracy of the testimony" as shown by the transcripts and extracts obtained and made by the Master from the Grand Jury proceedings (I, 137-8). This stipulation covered the testimony of Davis, Kaufman, and Stokley, and was so regarded by the Master (see Master's Report, VIII, 3518-9).

At the second hearing, *amici curiae* also submitted to the Master a "Memorandum . . . Suggesting Certain Witnesses to be Called and Certain Subpoenas to be

Issued" (I, 114-121). After extended argument, the Master indicated that the subpoenas would be issued (I, 129), and counsel for Universal agreed to treat the memorandum as though they had been issued and served (I, 138). They were directed to Universal Oil Products Company's officers and lawyers, and required the production of all writings pertaining in any way to the subject matter under inquiry.

At the second hearing *amici curiae* also sought clarification of the procedure to be followed, and among other things suggested that they should not be bound by the answers of hostile witnesses whom they might call, and that they should be permitted to examine such witnesses as though under cross-examination. Universal's counsel objected, and after extended argument in which they commented upon the status of *amici curiae* as litigants rather than as true friends of the Court (I, 133) the Master made the following observation and ruling (I, 133):

> "I do not think that the investigation—for that is all it is*—should be conducted strictly according to the rules of evidence in litigation. I certainly do not feel that either party should be bound by the statements of witnesses that they call, as very often, certainly, they will be adverse witnesses in a sense.
>
> "As regards the examination, itself, whether it should be cross-examination or not, I think we can control that as we come to it. I don't think that is a very serious thing one way or the other But I do think that its being an investigation, no one should be considered bound on either side if a witness makes an unexpected reply, which sometimes does happen."

* This is the sentence which Universal emphasizes in its brief (Pages 20, 36, 39).

During this same hearing, in commenting upon the probative value of the documents and transcripts of grand jury testimony submitted by the Master for inspection of counsel, petitioner's counsel said (I, 123-4):

> "However, if it were to involve any property rights of our clients, including the validity of any judgment, then, of course, none of this evidence would be admissible in a plenary action. We would have a right to require it to be sworn to and delivered in open court with an opportunity for cross-examination, and all the rights which litigants are guaranteed in a controversy or case under the Constitution of the United States."

In view of this statement, *amici curiae*, in the subsequent proceedings did not, except on stipulation with petitioner, offer a single document obtained by the Master without making proper proof thereof through witnesses appearing before him. Nor did *amici curiae* offer any transcripts of former testimony except in the cases of Hiram J. Halle (I, 280) and W. M. Behrens (I, 230) respectively petitioner's President and Secretary, whose Grand Jury testimony was offered as admissions against interest during their examination before the Master. Each witness then living whose previous testimony had been submitted to both sides and was considered material, was called as a witness, was examined by *amici curiae*, and was cross-examined by counsel for petitioner. All material points in the former testimony of these witnesses, as well as many other points not previously developed, were proved conclusively in their testimony before the Master.

In disregard of the facts, petitioner's brief (p. 21) asserts that "in spite of counsel's continuing exception, a transcript of much of the testimony adduced in the criminal trials entitled '*United States of America v. J. War-*

ren Davis and Morgan S. Kaufman' . . . was received in evidence, as was a transcript of the testimony given by various witnesses, including a part of the testimony of the Honorable John Biggs, Jr., Senior Circuit Judge, before federal grand juries. . . ." This statement is wholly misleading. The implication is that these transcripts were put in evidence over petitioner's objection as to the manner of proof, whereas in fact petitioner stipulated that they be made of record (IV, 1513-17; V, 1844-5, 1899). Petitioner's statement is also incomplete in that it fails to point out that on final hearing the Master sustained petitioner's objection to the materiality of the major portion of Judge Biggs's testimony and excluded it (VIII, 3519).

Neither at the ti[illegible] of the first hearing (I, 97) nor at any subsequent time prior to the petitions for certiorari herein, did counsel for petitioner object to the procedure outlined by the Master at the first and second hearings. On the contrary, it acquiesced therein, and availed itself of the opportunity thus extended to examine the records. At no time did counsel for petitioner ever request further opportunity to examine them, and at no time did the Master ever indicate to the petitioner that had such request been made it would not have been granted.

At no time did petitioner object to the Master's preliminary examination of documents, nor did petitioner ever demand to see or to have produced, documents which the Master had inspected but had not made available for counsel's inspection because he considered them immaterial.

In its objections and exceptions to the Master's Report filed by petitioner with the Court of Appeals, it did not complain of, or even mention, the use made in these proceedings of the Grand Jury records or of the statements

of witnesses to representatives of the Department of Justice. Petitioner complains of these matters for the first time before this Court.

The Nature of the Fraud.

In very brief outline, the fraud established in the hearings before the Master was as follows:

At some time prior to, or pending the *Root* appeal, petitioner entered into an arrangement with one Morgan S. Kaufman, an obscure referee in bankruptcy, residing at Scranton, Pennsylvania, to pay Kaufman a substantial fee in the *Root* case in the event the case was decided favorably to petitioner on appeal. Following the argument of the appeal on January 7, 1935, Kaufman vacationed in Florida with Judge Davis and at that time agreed to make a purported loan to Davis's cousin, one Stokley, for the purpose of redeeming certain real estate. Davis thereafter wrote the opinion of the court in petitioner's favor, and denied Root's petition for rehearing. Pending this disposition of the appeal Davis had conducted all the negotiations preliminary to effecting redemption of Stokley's property.

On October 21, 1935, this Court denied certiorari in the *Root* case. On October 22nd, Universal paid Kaufman $25,000.00, and on October 24th, Davis called Kaufman and Stokley together in his chambers and arranged to close the $10,000.00 loan from Kaufman. Kaufman's check for the loan was drawn on a bank account in which the *Root* fee had been deposited and in which there were not then sufficient other funds to meet the check. In fact the loan to Stokley was a bribe to Davis, Stokley making all interest payments to Davis and none to Kaufman until the conspirators learned of an F.B.I. investigation in 1939.

In 1936 petitioner paid Kaufman an additional $25,000.00 of which sum $5,000.00 was admittedly paid in the *Root* case. The balance was ostensibly allocated to other purposes but was wholly unaccounted for unless it was part of the sum paid Kaufman as compensation in the *Root* case.

Kaufman admittedly performed no legal services whatsoever in the *Root* case. His employment therein was secret; his name did not appear in any record, document, or brief in the case, and his connection therewith was wholly unknown at the time to the defendant's counsel.

No party to the fraud made a confession. The conspirators were caught in a web of circumstantial evidence comprising a mass of facts too detailed to set forth here. In general, it may be said that petitioner was wholly unable to give any satisfactory reason for the employment of Kaufman in the *Root* case or for the payment to him of $50,000.00; that the principals in the fraud involved themselves in many contradictions and incredible explanations; that important documents, including the personal diaries of the deceased Thomas G. Haight, petitioner's chief counsel in the *Root* case, and a check book stub of Stokley showing an interest payment of $400.00 to Judge Davis, were destroyed; that Davis's book of account was deliberately falsified by him; that the guilty principals were caught in lies where, on any reasonable assumption of innocence, no reason for lying existed.

The Master's Report (VIII, 3516-3600) contains a clear and concise review of the evidence which led him to the conclusion that the judgments of June 26, 1935, were invalid because tainted with fraud.

SUMMARY OF ARGUMENT

I.

The order of the Court of Appeals of December 29, 1944, dealt only with the question of costs and expenses, and did not in any way involve the question of fraud or the regularity of the proceedings by which it had been established. That question was finally adjudicated by the Court of Appeals' order of June 15, 1944. As petitioner did not seek review of this Court from that order, it is precluded from raising any question relating thereto at this time. Whether or not it was misled, as it contends, as to the nature of the order, is wholly immaterial (pp. 23-6).

II.

Even assuming that the question of due process is properly before this Court, petitioner was not deprived thereof in the proceedings leading up to the adjudication of its fraud, and, in any event, never made timely objection to the Master's Report on that ground (pp. 26-36).

III.

The Court of Appeals had inherent power and jurisdiction to hear and determine the question of whether its judgments in the *Root* case were void because obtained by petitioner's bribery of a judge who was a member of the Court which rendered them. Whatever question existed in the case of *Hazel-Atlas Co. v. Hartford Empire Co.*, 322 U.S. 238 as to jurisdiction in the Court of Appeals to hear the evidence relating to fraud and to vacate its own judgment as fraudulently-begotten, is wholly lacking here. In the *Hartford* case the judgment and

mandate of the Court of Appeals were valid acts of a duly constituted court; in the *Root* case no court ever sat on appeal, no valid judgments were rendered, and no valid mandates went down. The bribery of Judge Davis acted as a dissolution of the Court. The judgments and mandates of the Court of Appeals were nullities, so that jurisdiction of the causes remained in that Court (pp. 36-42).

The inherent power of the Court of Appeals to determine the fact of fraud and to vacate the fraudulently-begotten judgments, could not be defeated by Root's failure to act. At the time of the fraud, in 1935, the *Root* case was a "case or controversy" with adversary parties. When the fraud issue became known, it, in and of itself, did not need to be an independent "case or controversy"; it constituted a justiciable question in a pre-existing "case" upon which the court could act *sua sponte*, or upon the suggestion of strangers (pp. 42-7).

In passing upon the question of fraud affecting its own judgment, the jurisdiction of the Court of Appeals could not be dependent upon whether the facts were not in dispute so that they could be established by affidavit as in the *Hartford* case, or whether they were in dispute and therefore had to be established by *viva voce* testimony as in the case at bar. The choice between proof by affidavit and proof by testimony is a matter of procedure, not of jurisdiction. Where the question in issue affects the court's appellate jurisdiction, its right to receive extrinsic evidence has been recognized in many cases which do not differentiate between proof by affidavit, by deposition, or by a reference. Where fraud of the kind perpetrated by petitioner is involved, only the court whose integrity is in question should receive the proofs (pp. 47-53).

IV.

Petitioner's theory that the Court of Appeals lost jurisdiction when the issues of patent validity and infringement became moot between the record parties, is untenable because even as between them the case never reached the point where there was no longer subject matter on which the judgment of the court could operate. As the case never became wholly moot petitioner's whole argument fails with the failure of its premise (pp. 53-9).

V.

The constitutional requirement that there be a case or controversy with adverse parties as a requisite to the court's jurisdiction was also fully met by the appearance in the case, through their counsel, of certain oil refining companies against which, in their several cases, petitioner was asserting the fraudulent judgments in the *Root* case as binding adjudications and as precedents. Although not formally parties, these companies had sufficient interest to qualify as intervenors, or to file a bill of review. Looking through form to substance, they were present in the case as adversary parties, and would have been bound by the result had it been favorable to petitioner. The case or controversy requirement is not as rigid as petitioner suggests (pp. 59-67).

VI.

Having jurisdiction to conduct the proceedings, the Court of Appeals also had jurisdiction to assess the costs and expenses against the guilty party. It is elementary justice that he who bribes a judge should pay the expenses incurred in uncovering his guilt. The malefactors in the case at bar were men of great cunning and, with

one exception, were well-educated. Accordingly, three years were consumed in unraveling the circumstances of the fraud. The very considerable expenses thus incurred were met initially by the oil refining companies which were threatened by the *Root* judgments, but petitioner should be compelled to reimburse them? Were the courts without power to assess costs and expenses against malefactors such as petitioner, they would in most instances go free. Conversely, recognition and exercise of the power will tend to discourage such activities by other litigants of the type to whom ethical considerations are also meaningless (pp. 67-71).

ARGUMENT

I.

THE ORDER OF THE COURT OF APPEALS ENTERED ON JUNE 15, 1944, ESTABLISHING THE FACT OF FRAUD IN ITS JUDGMENTS OF JUNE 26, 1935, IS NOT BEFORE THIS COURT FOR REVIEW ON THE MERITS.

The order to which the petitions for certiorari herein were addressed is that of December 29, 1944, awarding against petitioner costs and expenses incurred in uncovering the fraud. That order did not purport to review in any way the report of the Special Master establishing the fact of fraud. Exceptions to that report had been presented, briefed and argued before the Court of Appeals prior to June 15, 1944, and on that day the full Court had unanimously adopted the Master's findings and conclusions, recalled its mandates, and vacated its fraudulent judgments.

The order of June 15, 1944, left nothing for future determination on the issue of fraud. On that issue it was final. True, it also directed the Clerk "to restore the causes to the argument list for reargument" appar-

ently because they had to be finally disposed of, but certainly no reargument of the issue of fraud could have been contemplated, for that issue had already been "fully argued" before the Court, as the order itself recites (IX, 3662).

The finality of an order or judgment vacating a fraudulent judgment is unaffected by a provision for further proceedings on other issues. *Hendryx v. Perkins*, 144 Fed. 801, 808-9 (C.C.A. 1); *In Re New England Oil-Refining Co.*, 9 F. (2d) 344, 347 (C.C.A. 1). See also *United States v. Turner*, 47 F. (2d) 86 (C.C.A. 8).

Within three months of the entry of the order of June 15, 1944, Universal could have petitioned this Court for writs of certiorari seeking review of the issue of fraud and of the question of due process. Having failed to do so, petitioner is forever precluded from seeking review of those issues in this Court, for they were determined by that order. 28 U.S.C. § 350; *Toledo Scale Company v. Computing Scale Company*, 261 U.S. 399, 417-8; *Turner v. Farmers' Loan and Trust Company*, 106 U.S. 552, 555; *Terry v. Sharon*, 131 U.S. 40, 48; *Central Trust Co. v. Grant Locomotive Works*, 135 U.S. 207, 226.

Concededly, petitioner can raise the point of lack of jurisdiction of the court to act at all in the matter of the fraud, and this, if established, would nullify the June 15th order. Petitioner cannot, however, properly be heard, under the claim of lack of due process, *to contest the regularity and propriety of the procedure followed by the court in reaching the determination embodied in that order**. Even if petitioner's complaints had substance,

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*The asserted errors are all in the proceedings leading up to the rendition of the order of June 15, 1944; no complaint is made of the proceedings thereafter and upon which the order of December 29, 1944, here under review, was based.

nevertheless they go merely to supposed errors of judgment in the choice of procedure and not to lack of power. *Cf. Market Street Ry. Co. v. Railroad Commission of California*, ... U.S. ....., 89 L. Ed. Ad. Op. 788, 797; *Corrigan v. Buckley*, 271 U.S. 323, 332; *Stephenson v. Kirtley*, 269 U.S. 163, 166, 167; *Jones et al. v. Buffalo Creek Coal Co.*, 245 U.S. 328, 329; *Central Land Co. v. Laidley*, 159 U.S. 103, 112; *Western Chemical Co. v. United States*, 271 U.S. 268, 271; *Tagg Bros. v. United States*, 280 U.S. 420, 442. Accordingly the objections were matters to urge on appeal from the June 15th order; they cannot be the basis for a mere collateral attack upon that order made under color of a review of the subsequent order. *Roller v. Murray*, 234 U.S. 738, 745-7; *Briscoe v. Rudolph et al.*, 221 U.S. 547, 553; *Insley v. United States*, 150 U.S. 512, 515; *White v. Crow*, 110 U.S. 183, 188; *Cooper v. Reynolds*, 10 Wall. 308, 315-6; *Parker Bros. v. Fagan*, 68 F.(2d) 616, 618; *Bohenik v. Delaware & Hudson Co.*, 49 F.(2d) 722, 725.

Although our brief in opposition to the petition for certiorari herein made the point above amplified (Br. in Opposition, p. 31), petitioner, in its present brief, has not seen fit to meet it. Instead, petitioner attempts to obscure the subject by the assertion (Br. pp. 23-4) that neither the conduct of the Master nor of the Court gave petitioner notice that its property rights were to be involved until the Court entered its order of December 29, 1944. Assuming there were merit in this claim (and we hereafter show it to have none whatsoever, *post* pp. 32-6), petitioner's asserted failure of comprehension cannot serve to toll the statutory period for seeking review of a final order. The subjective evaluation which a party claims to have placed upon a proceeding cannot be permitted to disguise or obviate the fact that it failed to seek timely review.

Moreover, as this Court said in *Market Street Railway Company v. Railroad Commission of the State of California*, ...U.S....., 89 L. Ed. Ad. Op. 788, 795:

> "A misapprehension by a litigant of the steps which its best interests require during a trial may be appealing grounds for a plea to the discretion of the hearing tribunal for another chance, but it is not grounds for our interference as a denial of constitutional rights."

II.

ASSUMING THAT THE QUESTION OF DUE PROCESS WAS NOT CONCLUDED BY THE ORDER OF JUNE 15, 1944, PETITIONER WAS NOT DEPRIVED THEREOF IN THESE PROCEEDINGS, AND IT MADE NO TIMELY OBJECTION.

Petitioner says (Br. pp. 39-40) that the Master's "extra judicial" activities in examining records and in selecting those which he deemed pertinent to the inquiry violated petitioner's rights to due process of law, and by its citation of such cases as *Interstate Commerce Commission v. Louisville & Nashville R.R. Co.*, 227 U.S. 88, suggests that, in making his findings, the Master acted on information gained by his inspection of documents not inspected by, or made available to, petitioner. This is a wholly misleading picture of the manner in which the Master discharged his duties in obedience to the order of the Court of Appeals.

Petitioner cannot assume that the Master saw documents helpful to its side of the fraud issue and deliberately chose not to produce them, or that he saw other documents harmful to petitioner which he noted but did not produce, and upon which he based his findings. In the absence of contrary proof, the presumption is that the Master discharged his duties fairly and impartially;

that he in fact made available to counsel for both sides everything which he found that was material to the issue. Petitioner is wholly unable to point to a single instance of actual prejudice to its interests resulting from the procedure directed by the order of the Court of Appeals and followed by the Master. That order (I, 94-96) authorized the Master (in accordance with the prayer of *amici curiae*, I, 44) to conduct an initial discovery in order to ascertain what, if anything, had been previously turned up by the Department of Justice in connection with the *Root* case. In its answer to the petition, Universal had previously made the objection (I, 71, footnote) that the privacy of Grand Jury proceedings could not be removed "where a private litigant seeks access to them for private purposes." This objection was met in the order of the Court (I, 98) by directing the Master, rather than *amici curiae*, to approach the Department of Justice for access to its records.

The purpose of this discovery was not to obtain records on the strength of which the fraud would be deemed to be established or refuted, but to make available to counsel leads which could be followed up, and names of witnesses whom they might call and such documents as might be subsequently introduced in evidence. As shown by his Report, the only use which the Master himself made of any of these records was (a) to show the conflict between Kaufman's Grand Jury testimony and his testimony in the case at bar on whether he had done any work on the *Root* briefs,* and (b) to confirm Stokley's testimony before the

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* *Amici curiae* had confronted Kaufman with this Grand Jury testimony. He admitted that he had thus formerly testified, and was unable to explain the discrepancy (II, 827). Counsel for Petitioner had previously conceded (I, 137-8) that the transcripts of Grand Jury testimony were "true and accurate documents."

Master on the vital point of the conversation with Davis when Kaufman's name was first mentioned as the source of the proposed loan (VIII, 3539). Both uses were entirely proper, confined as they were to the issue of credibility. The Master's Report, as appears on its face, is otherwise based wholly on the testimony adduced before him, and not on the documents which he had preliminarily examined.

In *Market Street Railway Co. v. Railroad Commission of California*, ...U.S....., 89 L. Ed., 788, 797, it was urged that the order of the Commission was invalid under the due process clause because it verified its findings by reference to the Railway Company's own reports which had not, however, been received in evidence or made part of the record. After pointing out that the company (as petitioner here) had made no showing of actual prejudice, this Court said:

> "* * * Due process, of course, requires that commissions proceed upon matters in evidence and that parties have opportunity to subject evidence to the test of cross-examination and rebuttal. But due process deals with matters of substance and is not to be trivialized by formal objections that have no substantial bearing on the ultimate rights of parties.
>
> * * * * * *
>
> "We are unwilling to say that such an incidental reference as we have here to a party's own reports, although not formally marked in evidence in the proceeding, in the absence of any showing of error or prejudice constitutes a want of due process."

Petitioner also says (Br. p. 44) that "Due process demands that everything considered by the Master should have been made available to petitioner and introduced in an orderly way, so that petitioner might have ample opportunity of refutation and cross-examination." Every-

thing considered by the Master *was* made available to petitioner in the Master's two memoranda of January 19th, and March 19th, respectively, and petitioner's counsel had notice of every hearing and participated therein with full opportunity to object, to cross-examine and to introduce evidence on its own behalf. *Cf. Spiller v. Atchison, Topeka & Santa Fe Ry. Co.*, 253 U.S. 117, 132. No prior statement of any person not thereafter called as a witness was made part of the record unless by stipulation, with the single exception of the statement to the United States Attorney of the late Thomas G. Haight, chief counsel for petitioner in the *Root* case, but petitioner itself strongly relied on this statement as one aspect of its defense. The Master and the court below did not act upon evidence of which petitioner was not cognizant and to which it had no opportunity to reply, as in the instances supposed in *Interstate Commerce Commission v. Louisville & Nashville R.R. Co.*, 227 U.S. 88, 93, 94, *Crowell v. Benson*, 285 U.S. 22, 48, and *Norwegian Nitrogen Co. v. United States*, 288 U.S. 294, cited by petitioner (Br. p. 42).

The further cases cited by petitioner (Br. p. 42), namely, *United States v. Appalachian Electric Power Co.*, 107 F.(2d) 769, 792, and *In re Aughenbaugh*, 125 F.(2d) 887, are not in point. In the *Appalachian* case, the defendant had expressly inquired at the hearing whether further or other evidence was to be considered, and it had indicated a desire to be informed of it if this proved to be the fact. Nothing was then said to indicate that the Commission "desired or would consider other evidence" but subsequently in defending a finding of the Commission that the dam in question would obstruct navigation and interstate commerce, it was contended that the Commission "must have considered" information

found in "various official reports, public documents, and Acts of Congress." As these matters "were not brought to the attention of the Company at the hearing," it was held that they could not be regarded as evidence "in the sense of due process." (107 F.(2d) 769, 792). Similarly, in *In re Aughenbaugh*, where the finding of the court was predicated upon the bankruptcy schedules, official appraisal, proofs of claim and other papers on file in the bankruptcy proceeding, none of which had been offered in evidence, it was held that if the trustee desired to rely upon these matters it was "incumbent upon him to offer them at the hearing . . . in order that the mortgagee might know that they were relied upon and might have an opportunity to meet them with such other evidence as might be available to it."

In the case at bar, the documents procured by the Master were offered to counsel for both sides for their inspection and study, first on January 19, and then on March 19, 1942.

Morgan v. United States, 304 U.S. 1, 19, (Pet. Br. p. 46), is not in point because in that case no specific complaint had been formulated and thus no reasonable opportunity to be fairly advised of what the Government proposed was afforded the appellants. Furthermore, the requirement of a "full hearing" was not met because the Secretary of Agriculture had accepted, and made his own, the findings which had been prepared by the active prosecutors for the Government, after an *ex parte* discussion with them, and without affording any reasonable opportunity to the appellants to know the claims thus presented and to contest them.

In the case at bar, the proceedings were initiated by petition and answer, and petitioner was fully informed

of the claim it had to meet both by the pleadings and by the order of the Court of Appeals (1, 94-5) directing the Master to report to the Court whether there was in connection with the prosecution and disposition of the *Root* cases "such fraud, corruption, obstruction or distortion of justice as tainted and invalidated the judgments rendered . . . on June 26, 1935."

Petitioner was also informed of the claim against it by the nature of the testimony being adduced. This Court said, in *Labor Board v. Mackay Co.*, 304 U.S. 333, 350:

> "A review of the record shows that at no time during the hearings was there any misunderstanding as to what was the basis of the Board's complaint. The entire evidence, pro and con, was directed to the question whether, . . . the respondent did in fact discriminate against the remaining five because of union activity. While the respondent was entitled to know the basis of the complaint against it, and to explain its conduct, in an effort to meet that complaint, we find from the record that it understood the issue and was afforded full opportunity to justify the action of its officers as innocent rather than discriminatory."

At no time during the hearings before the Master did petitioner ever demand to see the residual material which the Master had inspected but had not produced because he deemed it immaterial. After the Master's Report was filed finding the judgments of June 26, 1935, to be invalid because tainted with fraud, petitioner did not move to set aside the Report on the ground that the Master's inspection of documents which it had not seen disqualified him and deprived petitioner of due process. Nor was that point ever suggested to the Court of Appeals on exceptions and objections to the Master's Report, or otherwise. This Court has repeatedly held that it will

not review questions (other than those involving jurisdiction of the subject matter) not pressed or passed upon below. *Ana Maria Sugar Co. v. Quinones*, 254 U.S. 245, 251; *Grant Bros. v. United States*, 232 U.S. 647, 669; *Gila Valley Ry. v. Hall*, 232 U.S. 94, 98; *Magruder v. Drury*, 235 U.S. 106, 113; *Old Jordan Mining Co. v. Societe Anonyme Des Mines*, 164 U.S. 261, 264, 265; *Montana Ry. Co. v. Warren*, 137 U.S. 348, 351; *San Pedro Company v. United States*, 146 U.S. 120, 135-137. The rule applies even to a constitutional question. *Duignan v. United States*, 274 U.S. 195, 200.

Petitioner seeks to excuse its failure to make timely objection to the procedure of which it now complains (Br. pp. 19, 20, 23-4) by asserting that it was misled until too late, both by the Master and by the Court of Appeals, into the belief that the proceedings were of such a nature that they would not affect its property rights. Any such lack of comprehension was not possible. Its assertion is a mere afterthought raised for the first time in this Court.

Petitioner first relies (Br. pp. 19-20) on a remark by the Master at the first hearing of April 16, 1942, when he said that the investigation should not be conducted strictly according to the rules of evidence in litigation. This remark was made at a time when procedure was under discussion and before any testimony had been taken. It was in no sense a ruling; it was made parenthetically in connection with petitioner's objection to the suggestion of *amici curiae* (I, 130) that they should not be bound by the answers of adverse witnesses whom they might call and their suggestion that such witnesses should be examined as though under cross-examination. The Master's ruling was (I, 133) that neither party should be bound by such answers and that the question of cross-examination of hostile witnesses could be controlled "as we come to it."

At the ensuing hearings, when witnesses were called and examined and documents were offered in evidence, the Master conducted the proceedings strictly in accordance with the rules of evidence. Objections to testimony and exhibits were fully argued by counsel for both sides and ruled on by the Master. (As examples see I, 212; II, 439, 505-11; IV, 1475; Master's Report, VIII, 3519, 3531.) Whatever impression petitioner may have gathered from a chance remark of the Master at the preliminary hearing of April, 16, 1942, must inevitably have been dissipated by his subsequent conduct of the case, as petitioner's counsel themselves revealed by their insistence on strict proof throughout the proceedings. (As instances, see II, 452, 455-6, 463, 505-510; IV, 1475, 1484-7, 1493, 1507; V, 1848-1892.) From the time when the first witnesses were called, to the conclusion of the hearings, petitioner could not have been in any doubt that the proceeding was being conducted as a plenary judicial trial.

When the Master's Report was filed, petitioner was further and explicitly informed by the refusal of its proposed Finding No. 85, that in the Master's view, there were adverse parties with adverse interests in this proceeding (VIII, 3596), and, by his refusal of its proposed Conclusion No. 1, that it did, in fact, constitute a case or controversy within the meaning of Article III, Section 1, of the Constitution.

In the argument on exceptions to the Master's Report before the Court of Appeals, to which petitioner refers (Br. p. 23), petitioner's counsel, Robert T. McCracken, Esq., revealed that he understood clearly that petitioner's property rights were affected by the proceedings when he said, *inter alia*, that the Master:

> " . . . made certain findings which involved not only the Judge in question [and] the lawyer in ques-

tion, but also our client, the Universal Oil Products Company. He found that there had been a certain tampering or an attempt to tamper with the actions of the Judge . . . that the Universal Company had something to do with that tampering.

"It is because of this last inference which amounts to a finding and a very serious charge against our client, that we are here today."

Petitioner says (Br. p. 23) that on this argument it consented that the judgments be set aside, not on the ground of fraud, but to avoid even the appearance of suspicion. It further says that when the court vacated the judgments and set the causes for reargument, this "was in full accord with petitioner's wishes . . ." A complete refutation of any such contention lies in the fact that the Court of Appeals in its order of June 15, 1944, adopted the Master's Report *which had established the fraud and petitioner's complicity therein.* It must then have become evident to petitioner that the court had not adopted its views as to the grounds for vacating the judgments, but had agreed with the Master, who had said in his Report (VIII, 3548):

"I am convinced that Universal, while it probably did not know exactly what Kaufman would do with the money paid him, did know when it agreed to pay him a substantial fee in the event of a successful outcome of the case that he would use the money or the prospect of receiving it in some way to influence Judge Davis."

Petitioner's contention (Br. pp. 23-4) that it did not become aware until the order of December 29, 1944, that its property rights were to be affected, is further met by the fact that on July 24, 1944, well within the time when petitioner could have asked the Court of Appeals for rehearing of its order of June 15, 1944, and

well within the time when petitioner could have sought review in this Court from that order, petitioner was served (IX, 3684) with the Motion of *amici curiae* (IX, 3663-3684) for the taxing against petitioner of costs, fees and expenses totaling $155,967.96. By this motion petitioner was fully advised that, under authority of the order of the Court of Appeals of November 26, 1941, providing for the ultimate taxation of costs against *amici curiae* or against petitioner (I, 96), *amici curiae* were seeking to recover a money judgment against Universal for such costs. Furthermore, the order of November 26, 1941, had also provided (I, 96) that the Master might require *amici curiae* to deposit with him "a reasonable sum or sums as indemnity in respect of his expenses and compensation," and on December 14, 1943, the court had allowed to the Master as compensation for services and expenses the sum of $28,495.91 (IX, 3660A) which petitioner of course then knew full well would be assessed against it should the fraud be proven. Any possible doubt which it may have entertained was resolved by the provision in this order that

> ". . . final disposition of the liability of one or the other or both of said parties for the Master's compensation and expenses in this matter shall await and abide this court's ultimate determination with respect to the findings and recommendations contained in the report filed by the Master in this court on October 19, 1943."

By the plain terms above quoted, petitioner was put on notice that, if the court adopted the Master's report, petitioner, in all probability, and in accordance with established equity procedure, would be taxed with at least the sums allowed to the Master.

From all of the foregoing it appears that petitioner knew throughout that, in spite of its objection to the val-

idity of the proceedings, costs would be assessed against it should the fraud be proved. Hence, it is idle for petitioner to contend before this Court that it was misled by the Master and by the Court of Appeals, and was thus excused from making timely objection to what it considered error in the proceedings before the Master, or from petitioning this Court for certiorari within three months of the order of June 15, 1944.

III.

THE COURT OF APPEALS HAD INHERENT POWER AND JURISDICTION TO ENTERTAIN THE PETITION, TO HEAR THE EVIDENCE, AND TO VACATE ITS OWN JUDGMENTS.

In *Hazel-Atlas Co. v. Hartford-Empire Co.*, 322 U.S. 238, the inherent power and jurisdiction of a court of appeals to entertain proceedings showing fraud and to vacate its decree, even though the term of court had long expired, and the parties had settled all issues on the merits of the case, was found to exist in "the historic power of equity to set aside fraudulently begotten judgments". It was pointed out (p. 244), with the citation of numerous authorities, that this power has existed in courts of equity "from the beginning;" that it was "firmly established in English practice long before the foundation of our Republic;" and that it fulfilled "a universally recognized need for correcting injustices which, in certain instances, are deemed sufficiently gross to demand a departure from rigid adherence to the term rule." *Cf. Noonan v. Bradley*, 12 Wall. 121, 129; *Tyler v. Maguire*, 17 Wall. 253, 283.

That the public interest is paramount in such cases was emphasized in the *Hartford* case (p. 246):

> "* * * Furthermore, tampering with the administration of justice in the manner indisputably shown

here involves far more than an injury to a single litigant. It is a wrong against the institutions set up to protect and safeguard the public, institutions in which fraud cannot complacently be tolerated consistently with the good order of society."

The fraud perpetrated in the *Hartford* case consisted in the procurement by the patentee of the publication, by an ostensibly disinterested expert, of an article in a trade journal describing the invention as a remarkable advance, and the use of this article to obtain issuance of the patent and an adjudication of its validity and infringement by the Court of Appeals for the Third Circuit. The fraud was begun in the Patent Office and left its trail through the District Court and in the Court of Appeals. That court itself, however, was duly constituted and its decree was its lawful act. The appeal had been heard and decided, the mandate of the court had gone down, and final decree had been entered. All these things had to be undone not because, in contemplation of law, they had never happened, but because their happening had been fraudulently procured.

The fraud perpetrated in the case at bar was the bribery of a judge of the Court of Appeals by a litigant appearing before it. Therefore, no lawfully constituted court ever sat on appeal; no valid judgment was there entered, and no valid mandate ever went down. The last valid act of a duly constituted court prior to the fraud proceedings was that of District Judge Nields in allowing the appeal. Pursuant to that order the appeal was perfected but from that time on in contemplation of law, nothing further happened in the case until 1941. Jurisdiction of the case, therefore, remained in the interim where the last valid legal procedure had lodged it—namely, in the Court of Appeals. That court did not merely have to undo

lawful action which was fraudulently induced; it had to set aside apparent judgments and mandates which in law and fact were mere nullities having no legal effect whatever in reinvesting the lower court with jurisdiction of the case.

Thus, it appears that there is a fundamental difference between the *Hartford* case and the *Root* case in that in *Hartford* the fraud (which was practiced both below and above) related solely to the merits and did not in any way affect the jurisdiction of the Court of Appeals to render its judgment, whereas in *Root* the fraud (which was practiced only above) affected the jurisdiction of the Court of Appeals, that is, it operated as a dissolution of the court with the result that its purported judgments were absolute nullities.

From this it follows that whatever room there was for difference of opinion in the *Hartford* case on questions of jurisdiction and procedure as between the Court of Appeals and the District Court is wholly lacking here. A court victimized by the species of fraud revealed in the case at bar; *and that court alone,* must have the inherent power to protect its integrity in every way necessary, including the taking of proofs, the setting aside of its void judgments, and the assessing of costs against the guilty litigant.

That the disqualification of a judge results in the decree being absolutely void was held by this Court in *American Construction Co. v. Jacksonville etc. Ry. Co.*, 148 U. S. 372; *Moran v. Dillingham*, 174 U. S. 153; *Rexford v. Brunswick-Balke-Collender Co.*, 228 U. S. 339, and *Wm. Cramp & Sons Ship Co. v. International Co.*, 228 U.S. 645, in each of which, in violation of law, the judge who presided at the trial of the case in the District Court also sat in the same case on appeal.

In *The Bank of the United States v. Moss et al.*, 6 How. 31, 39, this Court said:

> "So a mistaken entry of a mandate, in a case where the parties were not at all before the court, may be revoked at a subsequent term, the hearing having been irregular and a nullity."

In the cases corruptly decided by Judge Manton in the Court of Appeals for the Second Circuit, that court, upon being shown by affidavits in support of the petitions for rehearing filed years later, that Manton had been bribed, properly treated the cases as still pending before it, vacated the fraudulent judgments, and, as the guilty litigant was in each instance the defendant, set the causes for reargument. See *In re 671 Prospect Avenue Holding Corporation*, 105 F. (2d) 960; *Art Metal Works v. Abraham & Strauss*, 107 F. (2d) 940, and 944; *Electric Auto-Lite Co. v. P. & D. Mfg. Co., Inc.*, 109 F. (2d) 566; *General Motors Corp. v. Preferred Electric & Wire Corp.*, 109 F. (2d) 615; *Schick Dry Shaver, Inc. v. Dictograph Products Co., Inc.*, 44 U.S.P.Q. 622. The orders vacating the fraudulent decisions in the *Art Metal Works* cases are reported in 42 U.S.P.Q. 638 and 639. A petition for writs of certiorari to review these orders was denied by this Court (308 U.S. 621).

State court decisions announce the same principle in broad terms. Thus in *Rowland v. Kreyenhagen*, 24 Cal. 52, the Supreme Court of California stated (p. 59):

> "* * * Against an order or judgment improvidently granted, upon a false suggestion, or under a mistake as to the facts of the case, this Court will afford relief after the adjournment of the term; and will, if necessary, recall a remittitur and stay proceedings in the court below. This is not done, however, upon the principle of resumption of jurisdic-

tion, but upon the ground that the jurisdiction of the Court cannot be divested by an irregular or improvident order. **In contemplation of law, an order obtained upon a false suggestion is not the order of the Court, and may be treated as a nullity.*** If, under color of such an order, the proceedings have in part [fact] found their way back to the Court below, yet in law they are considered as still pending in the Appellate Court, and that Court may take such steps as may be necessary to make the fact and law agree."

In *Daniel v. Elmer*, 113 N.J.L. 227, 228, 173 Atl. 911, 912, the Supreme Court of New Jersey said (p. 228):

"Unquestionably, an appellate court may vacate its judgment, if it is the product of fraud or imposition practiced upon that court or was entered through inadvertence or mistake. **It has been held that, in such a situation, the cause, in contemplation of law, remained in the appellate court; the remittitur being regarded as not the act of the court.** *Putnam v. Clark*, 35 N. J. Eq. 145."

In *Underhill v. Jericho*, 66 Vt. 183, 186, 28 Atl. 879, 880, the Supreme Court of Vermont said:

"* * * If its judgment order was . . . . issued by inadventure, by reason of concealment, fraud, misrepresentation, misinformation, or other default, so that the jurisdiction of the court of error has not been exercised upon the real cause, or in due course, and the remittitur does not represent the true judgment of the court of error, properly and orderly obtained, **the cause, notwithstanding the erroneous remittitur received by the trial court, is still in the appellate court or court of error, and its jurisdiction thereon has not been exhausted.**"

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* Emphasis in quoted matter ours throughout except where otherwise noted.

Other cases to the same effect are *Legg v. Overbagh*, 4 Wend. 188, 190; *Lovett v. State of Florida*, 29 Fla. 384, 405-6, 11 So. 176, 180; *St. Paul Fire & Marine Ins. Co. v. Peck*, 40 Okla. 396, 139 Pac. 417; *Cruger v. McCracken*, 87 Tex. 584, 30 S.W. 537; *McGuinness v. Superior Court*, 196 Cal. 222, 237 Pac. 42; 40 A.L.R. 1110; *Taylor v. Jones*, 202 Ala. 18, 79 So. 356; *Craig v. Craig*, 110 Kans. 13, 202 Pac. 594. See also 1 Freeman on Judgments (5th Ed.), § 226.

The conclusion from the foregoing decisions is that, as the judgments on appeal in the *Root* case were obtained by bribery of Judge Davis, they were absolutely void and mere nullities; that no valid mandates went down to the District Court, and, hence, that jurisdiction of the case remained in the Court of Appeals. Accordingly, that court alone, and not the District Court as well, had power to vacate the judgments on appeal. In speaking of the power to vacate judgments, the author says, in *Freeman on Judgments* (5th Ed. Vol. I, § 210):

> "The very nature of the power here under discussion and the manner in which it must ordinarily be exercised limit it to the court which rendered the judgment. Disregarding any supervisory or appellate powers of review or control, which are not here under consideration, one court, whether of co-ordinate or of superior jurisdiction, has no authority to open, set aside, or vacate the judgments of another court, except as it may be given by some statute. Such relief must be sought in the court whose judgment is attacked."

And in *Black on Judgments* (2nd Ed., Vol. I, § 297) it is stated:

> "The power to vacate judgments is an entirely different matter from the power to reverse judgments. It is a power inherent in and to be exercised by the court which rendered the judgment,

and to that court and no other the application to set aside the judgment should be made. * * * The power to vacate or open a judgment, or to set it aside, is a common law power possessed by the court as a part of its necessary machinery for the administration of justice, and hence might be exercised without the grant of special statutory authority."

In *In re Rochester Etc. Co.* (C.C.A. 2), 222 Fed. 22, 26, it was stated:

"The power to vacate or set aside judgments is a common-law power inherent in courts of general jurisdiction. All courts of record possess the power as incident to their existence. But the power is to be exercised by the court which rendered the judgment, and none other can take cognizance of the application."

The Inherent Power of the Court of Appeals to Determine the Fact of Fraud and to Vacate the Fradulently-Begotten Judgments Could Not Be Defeated by Root's Failure to Act.— The *Hartford* case recognized (p. 322) that from very ancient times there has existed an exception, under certain circumstances, to the rule of repose which prevents courts, both trial and appellate, from altering or setting aside their judgments after the expiration of the term at which they were entered, one of those circumstances being after-discovered fraud. If, in the case at bar, Root itself had moved the Court of Appeals as Hazel-Atlas did in its case, the decision there would precisely fit the situation here. Therefore, on this aspect of the case the narrow question is whether, as petitioner contends, the court was rendered powerless, and was bereft of jurisdiction, because it says the *Root* case ceased to be a "case or controversy" by reason of Root's settlement of issues other than fraud and of its refusal to take affirmative action with respect to that issue.

At the time petitioner bribed Judge Davis in 1935, the *Root* case was a "case" and it involved a "controversy"; it had arisen under the patent laws. On June 26, 1935, so the record showed, the Court of Appeals had determined that controversy, leaving only the question of the accounting for further determination in the District Court, and even that question was resolved by Root's 1939 settlement. But, in 1941, it was made to appear to the court that possibly there was such fraud practiced on the court itself in 1935, as may have tainted and vitiated its judgments. This raised a question that was incidental to the specific power of the court to decide the case on its merits,—a question existing in the case at a time when it was unquestionably a "controversy" with adversary parties,—as to whether the court's determination was valid; apparently something may have occurred which affected the very functioning of the court as a court of justice. That question did not need to be, in and of itself, an independent "case" or "controversy" in order for the court to have jurisdiction to determine it. It was wholly sufficient that it arose *in* a case or controversy.

It is intolerable to suppose that in the protection of its own integrity a court should be dependent on private business considerations of the record defendant which might, as here they did, impel its management to inaction because of a monetary obligation to stockholders (I, 8). In *Hartog v. Memory*, 116 U.S. 588, 591, this Court said:

> "... if, from any source, the court is led to suspect that its jurisdiction has been imposed upon by the collusion of the parties or in any other way, it may at once of its own motion cause the necessary inquiry to be made, either by having the proper issue joined and tried, or by some other appropriate form of proceeding, and act as justice may require for its own protection against fraud or imposition."

This Court held in the *Hartford* case that a federal court having acquired jurisdiction in a case or controversy once properly before it retains its power to act when fraud is discovered. There is nothing in that case that remotely suggests that this power could be defeated by a settlement of the parties or that it is dependent upon some particular machinery to set it in motion or to prosecute it, or that the power becomes effective only if invoked by the record defendent. While not expressly so declaring, it is inherent in this Court's decision in the *Hartford* case that the court which was so grossly imposed upon by the manufactured evidence could have acted *sua sponte*.

This Court has always held that considerations founded upon public interest override obstacles which in the absence of that interest might have caused the court to decline to act. The principle of these cases shows that the courts, where public interest is involved, are not dependent on the ability or willingness of a party to advance the point. Thus, a stipulation or waiver by the defendant is of no effect to prevent the court from determining that the contract in suit is illegal and contrary to public policy and therefore unenforceable, *Coppell v. Hall*, 7 Wall. 542, 558-9; *McMullen v. Hoffman*, 174 U.S. 639, 669; the estoppel of a patent licensee to contest the validity of the patent yields to the public interest in cases where the license would impose an unlawful restraint in the absence of a valid patent, *Sola Electric Co. v. Jefferson Electric Co.*, 317 U.S. 173, 177; and the estoppel by a former judgment which would ordinarily preclude a defendant in a patent infringement suit from raising a new defense has been held ineffective where the new defense is that of misuse of the patent to monopolize unpatented elements, and therefore involves the public interest, *Mercoid Cor-*

poration v. Mid-Continent Investment Co., 320 U.S. 661, 670. And, further, in the *Hartford* case itself, the lack of diligence of a litigant was not permitted to defeat the power of the court to vacate the fraudulently-begotten judgment, this Court saying (322 U.S. 246):

> "The public welfare demands that the agencies of public justice be not so impotent that they must always be mute and helpless victims of deception and fraud."

The ultimate disposition of any case in equity where fraud has been perpetrated by the plaintiff is that the complaint must be dismissed for unclean hands. It has always been held that this issue is not strictly a defense, that it requires no pleading, and that it may be invoked by the court itself to protect its own integrity. *American Insurance Company v. Lucas*, 38 F. Supp. 896, 921 (D.C. W.D. Mo.), affirmed 129 F. (2d) 143, (C.C.A. 8), certiorari denied, 317 U.S. 687; *Ford v. Caspers*, 42 F. Supp. 994, 998 (D.C. N.D. Ill.), affirmed 128 F. (2d) 884 (C.C.A. 7); *Memphis Keeley Institute v. Leslie E. Keeley Co.*, 155 Fed. 964, 974 (C.C.A. 6).

If, then, the Court of Appeals in the case at bar could have acted *sua sponte*, it necessarily follows that it could likewise have acted, as it did, on the suggestion of parties, who though not of record in the case, were adversely affected in their legal rights by the fraudulent judgments. To suppose that this Court's decision in the *Hartford* case may be distinguished merely because there the record defendant was the moving party, whereas here the moving parties were those who were secondarily rather than primarily liable, would ignore substance and fix on form as the determining factor — in defiance of every principle of equity.

As was said in *Pueblo De Taos v. Archuleta et al.*, 64 F. (2d) 807, 812 (C.C.A. 10):

> "... But all such objections may be brushed aside with the statement that the court is the protector of the purity of its own process, and may take such steps as are necessary to protect against its abuse, on its own motion, or upon the suggestion of a stranger; and neither state statutes nor ordinary procedural rules can thwart a prompt and efficacious discharge of that paramount obligation."

In *Lord v. Veazie*, 8 How. 251, this Court received affidavits and other evidence, in support of a motion to dismiss, filed by third persons not parties to the suit, showing that there was no real dispute between the plaintiff and defendant, but on the contrary that the action was fictitious, and designed to prejudice the rights of the movants. Upon these proofs *aliunde*, presented by non-parties, this Court concluded that the "judgment of the Circuit Court entered *pro forma* in this case is a nullity and void, and that no writ of error will lie upon it."

In *Cleveland v. Chamberlain*, 1 Black 419, the motion to dismiss the appeal was made on behalf of the Milwaukee and Minnesota Railroad Co., its stockholders and creditors, upon affidavits showing that Chamberlain had bought out Cleveland entirely, was hence the sole party in interest, and was prosecuting the appeal for the evident purpose of obtaining a decision injurious to the rights and interests of third persons. The order of this Court dismissing the appeal expressly recites that the action of the Court was based upon "affidavits and other evidence filed in this case in behalf of persons not parties to this suit."

In *Wood Paper Co. v. Heft*, 131 U.S. App. xcii, and 8 Wall. 333, this Court permitted one Meach to intervene

by counsel upon an allegation that since the entry of the decree below, the case had been settled and was being prosecuted in this Court to influence pending suits "against strangers to this suit, and in which the same questions are involved," the intervenor being a defendant in one of these suits. A commission to take proofs on the matter was issued and upon the basis of these proofs this Court sustained a motion to dismiss the appeal.

In *Gumbel v. Pitkin*, 124 U.S. 131, this Court said (pp. 145-146):

> "As we have already seen, and as has been many times declared by this court, the equitable powers of the courts of the United States, sitting as courts of law, over their own process, to prevent abuse, oppression and injustice, are inherent, and as extensive and efficient as may be required by the necessity for their exercise, **and may be invoked by strangers to the litigation** as incident to the jurisdiction already vested, without regard to the citizenship of the complaining and intervening party."

Whether the inherent power of the court to vacate a decree obtained by fraud is set in motion by the record defendant or by others is, therefore, wholly immaterial. To hold otherwise would be to deprive the court of its power of self-protection and to place its integrity in the precarious custody of private litigants.

The Court of Appeals Had Power to Do What Was Necessary, Including the Taking of Testimony, to Determine Whether Its Own Judgments Were Tainted With Fraud.—This Court's decision in *Hazel-Atlas Co. v. Hartford Empire Co.*, 322 U.S. 238, recognizes the power of the Court of Appeals to receive evidence to determine whether its own judgment has been fraudulently induced. In that case the ultimate facts were not disputed, and so

this Court approved of their having been shown by affidavit, rather than by testimony, leaving undecided the question (Footnote p. 249)

> "whether, if the facts relating to the fraud were in dispute and difficult of ascertainment, the Circuit Court here should have held hearings and decided the case or should have sent it to the District Court for decision."

Certain it is that the fraud in the case at bar could never have been established by affidavits. It was difficult of ascertainment, and there was that dispute on material questions of fact which this Court said in the *Hartford* case (footnote, p. 249) requires examination and cross-examination of witnesses. Furthermore, credibility of the principal actors was a vital issue, to be determined in large measure by their demeanor on the witness stand. Was this, therefore, a situation which, had it existed in the *Hartford* case, would have inclined this Court to deny power in the Court of Appeals to receive the testimony?

The *Hartford* case recognizes the basic principle of power in the Court of Appeals to hear evidence where its own judgment is under suspicion of fraud. Given such power, there is no such difference between proof by affidavit and proof by testimony as would recognize jurisdiction in the one instance and deny it in the other. It is not a question of jurisdiction but of procedure. Ordinarily, proof by affidavit is vastly inferior in quality to proof by testimony. In the case at bar, affidavits would have been futile. The convenient and efficient way of ascertaining the facts was by hearings before a master, and had he been appointed by the District Court rather than by the Court of Appeals, petitioner's rights to a full and fair hearing could not have been more zealously protected.

The statutory inhibition (R.S. § 698, 28 U.S.C. § 863) against the receipt of evidence by a federal appellate court merely prevents such a court from adding to or changing the record brought up on appeal; it has nothing whatever to do with the power of appellate tribunals to receive evidence on matters touching their own integrity or jurisdiction. This power has often been recognized.

In *Kimball v. Kimball*, 174 U.S. 158, this Court said (p. 162):

> "From the necessity of the case, this court is compelled, as all other courts are, to allow facts which affect its right and its duty to proceed in the exercise of its appellate jurisdiction, but which do not appear upon the record before it, to be proved by extrinsic evidence."

In *Ridge v. Manker* (C.C.A. 8), 132 Fed. 599, 601, the court said:

> "An appellate court may avail itself of authentic evidence outside of the record before it of matters occurring since the decree of the trial court when such course is necessary to prevent a miscarriage of justice, to avoid a useless circuity of proceeding, to preserve a jurisdiction lawfully acquired, or to protect itself from imposition or further prosecution of litigation where the controversy between the parties has been settled, or for other reasons has ceased to exist."

In *American Wood Paper Co. v. Heft*, 131 U.S. Appendix xcii, this Court entered a rule to show cause why the appeal should not be dismissed because it was really moot and was being prosecuted to adversely affect the rights of strangers to the action, and gave leave to both parties "to take depositions on sufficient notice before any Commissioner of the United States, in support of the rule and against it."

Upon the evidence so taken, some of which was conflicting, this Court found the facts to be as alleged and dismissed the appeal. 8 Wall. 333.

In a mild sense in comparison with the situation in the case at bar, there was, in the *Heft* case, an attempt to make fraudulent use of the process of the court. No distinction in principle can be drawn between the action taken by this Court in the *Heft* case and that taken by the Court of Appeals in the case at bar. The difference is merely in degree between the comparatively venial offense in the *Heft* case and the shocking crime in the case at bar. In the *Heft* case, the integrity and power of this Court being in issue, it did not hesitate to grant leave to take testimony before a commissioner on a controverted issue of fact. The *Heft* case was called to the Court of Appeals' attention in the brief accompanying the petition of *amici curiae* (I, 51-2). It furnished ample authority for the similar course which that court adopted.

In *Dakota County v. Glidden,* 113 U.S. 222, judgment in the court below had been rendered on certain county bonds, and the defendant brought a writ of error to this Court to reverse that judgment. Subsequent to its entry, and after the case came before this Court, there had been a settlement between the parties whereby new bonds were given in place of the old which were then destroyed. Plaintiff then brought a motion in this Court to dismiss the writ of error, and supported the motion by affidavits setting forth the facts as to the settlement. It was objected that the legal effect of the compromise could not be considered because the facts relating thereto did not appear of record. This Court dismissed the writ of error and said (pp. 225-226):

> "It is said that to recognize this compromise and grant this motion is to assume original instead of appellate jurisdiction.

"But this court is compelled, as all courts are, to receive evidence *dehors* the record affecting their proceeding in a case before them on error or appeal.

* * * *

"It is by reason of the necessity of the case that the evidence by which such matters are brought to the attention of the court must be that, not found in the transcript of the original case, because it occurred since that record was made up.

"To refuse to receive appropriate evidence of such facts for that reason is to deliver up the court as a blind instrument for the perpetration of fraud, and to make its proceedings by such refusal the means of inflicting gross injustice."

In *Kendall v. Ewert,* 259 U.S. 139, the jurisdiction of the Circuit Court of Appeals having been questioned by a motion to dismiss based on a stipulation, and this stipulation having been assailed by counter-motion as fraudulently obtained, the Court ordered that the appeal and the motion to dismiss stand continued, and directed the District Court to investigate the circumstances attending the execution of the stipulation and to report to the Circuit Court of Appeals the evidence and findings on whether the stipulation was valid, and, therefore, a final settlement of the case. Although the direction was to the District Court it appears from this Court's opinion (259 U.S. 142) that:

"Both the Circuit Court of Appeals and the District Judge treated this order as one of reference, merely, to the District Judge (not to the District Court), to take testimony and report his findings of fact as to the validity of the stipulation, * * *."

On review, this Court did not question the propriety of the procedure adopted by the Circuit Court of Appeals in adducing by way of reference, evidence determinative of its jurisdiction to consider the appeal, and in using the

District *Judge** rather than the District *Court* as the agency to transmit this advisory report. In fact this Court relied upon this very evidence, and held, contrary to the conclusion of the Court of Appeals, that the stipulation of dismissal, on which the motion to dismiss had been based, was void because fraudulently obtained.

The foregoing authorities establish that this Court, in exercising its inherent power to consider new evidence pertaining to its appellate jurisdiction, has considered not only evidence adduced by affidavit, and proofs taken by depositions before a commissioner, but also proof taken on a reference ordered by a Court of Appeals. Therefore, the question apparently reserved in the *Hartford* case is actually settled by precedent.

Finally, we note again the vital difference in the kind of fraud perpetrated in the *Hartford* case and in the case at bar. There the court was blameless and the plaintiff alone was guilty, whereas here a judge of the court shared equal guilt with petitioner. In the latter case it is more in keeping with the court's dignity to hear the evidence itself. Public policy requires recognition of the principle that a court defrauded and imposed upon as the Court of Appeals was in this case, should, in the protection of its own integrity, have power to uncover the conspiracy. A court so assailed should not have to turn to others for help. As Mr. Justice Cardozo said† when sitting on the New York Court of Appeals:

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* The *Kendall* case could not have been remanded to the District Court for decision because the appeal had been perfected, and that Court, the term having elapsed, had therefore lost jurisdiction of the cause. On the other hand, the Court of Appeals alone had jurisdiction if the stipulation of dismissal were void because fraudulently obtained. Therefore, precisely as in the case at bar, the Court of Appeals appointed its own agent to ascertain the facts and to render an advisory report.

† In *People v. Culkin*, 248 N.Y. 465, 162 N.E. 487.

> "If the house is to be cleaned, it is for those who occupy and govern it, rather than for strangers, to do the noisome work."

In *Hatfield v. King*, 184 U.S. 162, this Court said with respect to charges of collusion in the Circuit Court (p. 168):

> "... It is fitting that this investigation should be had in the first place in the court where the wrong is charged to have been done and before the judge who, if the charges are correct, has been imposed upon by counsel, and it may be wise that both examination and cross-examination be had in his presence."

Fraud of the kind perpetrated by petitioner, Kaufman and Davis will rarely, if ever, be repeated if our institutions are to endure. But, if repeated, the procedure followed by the Court of Appeals herein would be that most likely to insure the maximum of protection for the court and of jeopardy for the malefactors.

IV.

The Root Case Never Became Wholly Moot and the Parties of Record Were Always in an Adversary Relationship.

We have proceeded thus far on the premise that every question now before this Court is resolved in favor of jurisdiction by the inherent power of the Court of Appeals to take necessary action to vacate and set aside its own decree when satisfied that said decree was the subject of barter and sale by the judge rendering it.

But even assuming that such inherent power be lacking, and that a court can act on the issue of fraud in its own decree only as it could act on any other issue, *i.e.*, on one between parties appearing in a pending case, still the court had jurisdiction in the *Root* case.

We assume that if the accounting ordered by the District Court's interlocutory decree of April 27, 1934, had been pending when the fraud on appeal was discovered, petitioner would not question that the court would have had power to set aside the fraudulently-begotten decree. Petitioner's premise is that the whole case was terminated by the settlement of April 1, 1939, from which it concludes that thereafter there was no case or controversy with adverse parties, and that this wholly deprived the court of jurisdiction.

But as a matter of fact, the entire case was not disposed of by the April, 1939, settlement.

In attempting to uphold the contrary view, petitioner relies wholly (Br. pp. 11-13) on what was said by Judge Denison and Mr. von Holst in the initial oral presentation of the matter on June 5, 1941. Petitioner's counsel, however, then disagreed with the views thus expressed, Judge Haight saying (I, 18-19):

> ". . . Judge Denison, I think, is wrong in saying that there has been a complete settlement of the Root case. The decree that was made is still outstanding, and that decree carries with it an injunction and an order for an accounting. The accounting was settled, a license was taken, so I take it that the case is still alive."

(I, 27):

> "I was going to say this, so far as the decree is concerned, you understand the minute Root stops paying royalties, then the decree would become effective if we wanted to make it effective, and the injunction would go against him, so there is still an outstanding decree. . . ."

In the pleadings thereafter filed Judge Haight's view was accepted by *amici curiae* and confirmed and re-

iterated by Universal. Thus in paragraph IV of the petition *amici curiae* it was alleged (I, 31):

> ". . . The settlement provided that the above-entitled causes should be dismissed; but, by subsequent agreement entered into the next day, to-wit, on January 25, 1939, this provision was modified and it was agreed that neither party to the suits should take any further action or proceedings of any kind or nature whatsoever (save for the discharge of Root's *supersedeas* bond, and dismissal of certain proceedings it then had pending for rehearing) without first obtaining the written consent thereto of the other, with the result that the above-entitled causes are still formally pending in the District Court of Delaware."

Universal's answer admitted these allegations with certain qualifications (I, 61):

> "I. Universal admits the allegations of paragraph IV of said petition except that it denies that any agreement had ever been consummated for the dismissal of the above entitled causes. Universal alleges that there is outstanding a decree in the above entitled causes, and that said causes, as alleged in said petition, are still pending in the United States District Court for the District of Delaware."

Thus, the views expressed by Messrs. Denison and von Holst at the initial presentation of June 5, 1941, were superceded by the allegations of the formal pleadings, and are refuted by the record facts. Furthermore, the present views of petitioner's counsel are not only wholly at odds with those first expressed by them, but are also refuted by the facts. Universal did not merely argue that the case was not moot; it took affirmative action to preserve its adversary status.

Neither did Root, although declining to take an active part, or to incur expenses* in uncovering the fraud, adopt a wholly neutral attitude. It declined to accept petitioner's offer that the case be reargued and that Root be confirmed in its settlement should the result on reargument be the same. This offer was most generous. It revealed petitioner's intense anxiety to forestall the investigation, if possible. Root's acceptance of the offer would have materially furthered this purpose, assuming, of course, that the Court of Appeals would have permitted the matter to rest there. Therefore, in failing to accept the offer† Root adopted an attitude definitely hostile to petitioner's interests. With regard to whether the investigation should proceed, Root was Universal's adversary—not actively forwarding the proceeding, but nonetheless both sacrificing and preserving possible advantages in order that it might proceed. Acceptance of the offer would have made it possible for Root to be forever freed of infringement, should the new Court reverse the old on re-argument, but affirmance would have put it beyond Root's power ever to assert the fraud in repudiation of its 1939 settlement with petitioner. Non-acceptance had the opposite effect; it deprived Root of

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* Root was, of course, the chief victim of petitioner's fraud, but it had reason to have lost all confidence in the justice of its cause in the Third Judicial Circuit. It had lost in the District Court and in the Court of Appeals, first on the issues of patent validity and infringement, and subsequently on an issue of abatement. When conducting an expensive accounting it had again presented a petition to reopen its case on the ground of Universal's unclean hands in the suppression of evidence of prior invention of the subject matter of the Dubbs patent by one Otto Behimer, a Texas Company employee. On the day after the argument of this petition Root settled its case—evidently by then convinced that suits are immortal while men are mortal.

† *Amici's* Brief (I, 47), thereafter filed, shows that the offer was transmitted to Root and declined. It says: "So far as Root is concerned it . . . has not authorized any action."

its chance of a reversal on re-argument, but permitted Root, when the fraud was finally adjudicated by the Court of Appeals' order of June 15, 1944, to enter into a new and much more advantageous settlement with petitioner (that of July 28, 1944, Appendix, p. XIV), whereby it acquired a free license under petitioner's pyrolytic cracking patents and was forgiven the sum of approximately $317,000.00 in accrued royalties under the 1939 license agreement. From this it follows that from 1941 to 1944—the period when the issue of fraud was being tried—Root's position was of an adversary nature toward petitioner to the extent that Root deliberately kept alive its cause of action for fraud and deceit and eventually asserted it against petitioner in obtaining its new settlement.

Whether a case is moot cannot depend upon the quantum of adverse interest. Petitioner's interest was limited to preserving its right to invoke the coercive power of the injunction should occasion arise. Root's interest was to preserve its right of action for fraud.

In *St. Pierre v. United States*, 319 U.S. 41, it was held that to divest a court of power to act in a case it must appear that there is no longer subject matter on which the judgment of the court could operate. In the *Root* case, neither party of record was ever willing to place the case in that condition. Therefore, even though the Court were impotent save on an issue arising in a pending case with adversary parties of record, there was such an issue in such a case, and there were such parties.

In *Federal Trade Commission v. Goodyear Tire & Rubber Co.*, 304 U.S. 257, 260, it was held that the presence of such subject matter prevents a case from becoming moot. The Commission had issued a desist order on

the ground that Goodyear had sold merchandise to Sears Roebuck and Company at lower prices than to other dealers in violation of § 2 of the Clayton Act. Pending the hearing in the Court of Appeals the Act was amended to expressly disallow the justification on which Goodyear was relying. Thereupon that company ceased operating under its existing contracts with Sears Roebuck and averred that it would terminate all contracts with it within the year. Against the contentions of both parties, the Court of Appeals held that the case had become moot because there was no longer any controversy between the parties as to the illegal character of Goodyear's practices under the amended Act. In reversing, this Court said (p. 260):

> "... The Commission, reciting its findings and the conclusion that respondent had violated the Act, required respondent to cease and desist from the particular discriminations which the order described. **That is a continuing order. Its efficacy, if valid, was not affected by the subsequent passage or the provisions of the amendatory Act.** As a continuing order, the Commission may take proceedings for its enforcement if it is disobeyed. But under the statute respondent was entitled to seek review of the order and to have it set aside if found to be invalid. The question which both parties sought to have the Circuit Court of Appeals decide was whether respondent's conduct was a violation of the original statute. Upon the conclusion that it was such a violation, the Commission based its order. Neither the transactions subsequent to that order nor the passage of the amendatory Act deprived the respondent of its right to challenge the order and to have its validity determined, or the Commission of its right to have its order maintained if validly made."

The continuing nature of the desist order in the *Goodyear* case finds its close equivalent in the case at bar in the

fact that on petitioner's insistance no decree of dismissal was entered following the 1939 settlement of the issues of patent validity and infringement, in order that Universal might always invoke the coercive power of the injunction in case Root should violate its contract. See also *Walling v. Helmerich & Payne, Inc.*, 323 U.S. 37, 43. Therefore, the case as a whole never became moot even as between petitioner and Root. Petitioner's whole argument fails with the failure of its major premise.

Entirely apart from the Court of Appeals' inherent power to act to set aside its decree where its own integrity is assailed, the *Root* case never reached the stage where, as this Court said in *Brownlow v. Schwartz*, 261 U.S. 216, 217, a judgment "would be wholly ineffectual for want of a subject matter on which it could operate."

V.

THE REQUIREMENT OF ADVERSE PARTIES IN A CASE OR CONTROVERSY WAS ALSO FULLY MET BY THE APPEARANCE IN THE CASE OF ATTORNEYS REPRESENTING OTHER OIL REFINING COMPANIES ADVERSELY AFFECTED BY THE JUDGMENTS HEREIN.

In *Hazel-Atlas Co. v. Hartford Co.*, 322 U.S. 238, 246, this Court emphasized the point that the perpetration of fraud in a patent case "does not concern only private parties" for "there are issues of great moment to the public in a patent suit."

This was emphatically true in the case at bar. Petitioner had practically dominated the cracking art with the Dubbs "clean circulation" patent, and its royalties ran into millions of dollars a year (VII, 2558-9; see also *Universal Oil Products Co. v. Globe Oil & Refining Co.*, 40 F. Supp. 575, 579). Only a few independent refiners, operators of the unpatented Winkler-Koch still

(*ante*, p. 4), refused to accept licenses from petitioner. Nevertheless, this competition was so serious a threat to the future of petitioner's business that its President testified that had Universal lost the *Root* case its entire licensing system would have been destroyed* (VII, 2558).

The petroleum industry had a direct and vital interest in receiving from the Third Circuit Court of Appeals a fair and honest decision as to the validity and scope of the claims of the Dubbs patent. Therefore, the entire industry was swindled by the fraud, and the price which the public paid for gasoline doubtless reflected the effects of the swindle. The Mid-Continent Petroleum Company paid petitioner $1,000,000.00 in 1936 for a license under the Dubbs patent solely because of the fraudulent judgments in the *Root* case (I, 287, 321-2; VII, 2520-22).

Certain other members of the public were peculiarly affected. These were the independent oil refiners, Skelly Oil Company, Globe Oil & Refining Company, Eldorado Refining Company, and Rock Island Refining Company, against which, in suits brought for infringement of the Dubbs and Egloff patents, petitioner had asserted that the judgments of the Court of Appeals in the *Root* case were binding adjudications. One of them, Globe Oil & Refining Company, had actually been held to have been a privy to the defendant in the *Root* case (27 F. Supp. 161) and although the decision was modified (31 F. Supp. 665) on Root's 1939 settlement, nevertheless the issue of *res judicata* confronted Globe on appeal, and might well have been decided against it but for petitioner's with-

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*Petitioner's entire business really depended on the meaning of the word "vaporization" as used in the claims of the Dubbs patent. In order to prevail in the *Root* case Universal had to persuade the court that the word did not have its customary meaning—a contention which wholly failed in the Seventh Circuit and before this Court. *Universal Oil Products Co. v. Globe Oil & Refining Co.*, 322 U.S. 471.

drawal of the issue after the initiation of the fraud proceedings (I, 61-2). Furthermore, the unanimous decisions of the District Court and of the Court of Appeals in the Third Circuit were strong precedents in petitioner's favor, and had been thus asserted in cases against these refiners and against Anderson-Prichard Oil Company.

There can, therefore, be no doubt that these refiners had as vital an interest as had the defendant, Root, in uncovering the fraud in the Third Circuit Court of Appeals and in procuring a vacation of the judgments by which they were putatively bound. Their interest was just as much of an adversary nature toward petitioner as was Root's. They appeared in the *Root* case, in the Court of Appeals, through counsel, who also acted as friends of the court, and these counsel called witnesses and examined and cross-examined them, offered numerous documents in evidence, briefed the case before the Master, and both briefed and argued it before the Court of Appeals. So zealous were their efforts that petitioner's counsel would not concede their status as *amici curiae* (I, 133) and strenuously insisted that they were representing mere litigants. There can be no doubt whatsoever that these litigants were prosecuting a case or controversy against Universal of a very vital and adversary nature, one that Universal injected into the *Root* case in the Court of Appeals by its misconduct therein in 1935. Although not formal parties to the record, they had sufficient interest to have filed a bill of review (*Kreeman v. Howe*, 65 U.S. 450, 460; *Story's Equity Pleading*, Section 429), or a petition to intervene (*Compton v. Jesup, et al.*, 68 Fed. 263, 279, C.C.A. 6). They had a greater interest in the matter before the Court than had the intervenor in *American Wood Paper Co. v. Heft*, 131 U.S. App. xcii. Disregarding form, and con-

sidering only substance, the appearance of counsel representing the seven companies, and the fact that these lawyers had the laboring oar in the controversy, made their clients parties (*Drummond v. United States*, 324 U.S. 316). Had petitioner been vindicated of the charge of fraud, each of the seven companies would certainly have been bound by the decision and estopped to assert the fraud in each of their several cases (*Souffront v. Compagnie des Sucreries*, 217 U.S. 475, 486-7).

The fact that the proceedings were prosecuted in the Court of Appeals rather than in the District Court is immaterial under this Court's decision in *Hazel-Atlas Co. v. Hartford-Empire Co.*, 322 U.S. 238. The petition in that case, filed in the Court of Appeals, was termed in this Court's opinion (p. 247) a "bill of review proceeding." True, the petition there was filed by the record defendant whereas here the petitioners were those under threat of being bound in their several cases by the *Root* judgments. But these others had sufficient interest to give them the right to prove, once and for all in the case in which the fraud had been committed that the judgments in that case were null and void because procured through bribery of a judge. To require that these defendants should be obliged to prove the fraud each in its own suit would be a denial of that "traditional flexibility of equitable procedure" which this Court emphasized, and an insistance upon that "cumbersome and dilatory procedure" which this Court condemned, in the *Hartford* case (p. 249). To prove this fraud in one suit took three years and was costly enough. To require that it be proved seven times again would, in practical effect, go far to insure the wrongdoer against the full consequences of its offense.

The recent decision of this Court in *Walling v. Reuter Co.*, 321 U.S. 671, is in point. In that case, after certiorari had been granted, the respondent corporation was dissolved and a motion was made to recall the writ on the ground that the case had become moot and that "for want of a party respondent" this Court was "without power to render any effective judgment" in the appellate proceedings before it. This Court held that the *initial vitality* of the judgment entered in the District Court survived a dissolution of the corporation against which it was entered, because the petitioner was still able to "assert his rights against such other persons as may be bound by the judgment." Similarly, in the case at bar, although Root had settled its case, petitioner was still asserting the fraudulently begotten *Root* judgments against others. In this situation, the power of the court below to render an effective judgment in the appellate proceedings before it and make such disposition of those proceedings as justice required is not open to challenge. Thus in the *Walling* case this Court said (pp. 676-7):

> "It is a familiar practice of this Court that where for any reason the Court may not properly proceed with a case brought to it on appeal, or where for any reason it is without power to proceed with the appeal, it may nevertheless, in the exercise of its supervisory appellate power, make such disposition of the case as justice requires. When events subsequent to an appeal may affect the correctness of the judgment appealed from, this Court may vacate the judgment and remand the cause for further proceedings. . . . If a judgment has become moot, this Court may not consider its merits, but may make such disposition of the whole case as justice may require. *United States v. Hamburg-American Co.*, 239 U.S. 466, 477-478; *Heitmuller v. Stokes*, 256 U.S. 359, 362-363; *Brownlow v. Schwartz*, 261 U.S. 216, 218."

Equity looks through form to substance, *Young v. Higbee Co.*, 324 U.S. 204. When the proceedings were in progress before the Special Master and before the Court of Appeals, petitioner knew full well that it was engaged in a trial against adversary parties of a bitterly controverted issue in a lawsuit. It exercised all the rights of a litigant in cross-examining witnesses, in entering objections to evidence, and in briefing and arguing the case. To deny reality to these proceedings because of the personnel of Universal's opponents would be to ignore substance entirely.

In *Morgan v. United States*, 304 U.S. 1, this Court said (p. 20):

> "The answer that the proceeding before the Secretary was not of an adversary character, as it was not upon complaint but was initiated as a general inquiry, is futile. It has regard to the mere form of the proceeding and ignores realities. In all substantial respects, the Government acting through the Bureau of Animal Industry of the Department was prosecuting the proceeding against the owners of the market agencies. The proceeding had all the essential elements of contested litigation, with the Government and its counsel on the one side and the appellants and their counsel on the other. It is idle to say that this was not a proceeding in reality against the appellants when the very existence of their agencies was put in jeopardy. Upon the rates for their services the owners depended for their livelihood, and the proceeding attacked them at a vital spot."

The "case or controversy" requirement is not subject to any such rigid construction as that insisted on by petitioner. Even in the absence of a formal plaintiff and defendant the constitutional requirement may be fully met. Thus, *Re Summers, Petitioner*, . . . U.S. . . .,

89 L. Ed. Ad. Op. 1304, involved an application for admission to the bar by a citizen of Illinois which had been rejected by a Committee on Character and Fitness whose action had been approved by the Supreme Court of Illinois. In that case it was said (pp. 1307-8):

> "The brief for the Justices raises the question as to who are the adversary parties. . . . Where relief is thus sought in a state court against the action of a committee, appointed to advise the court, and the court takes cognizance of the complaint without requiring the appearance of the committee or its members, **we think the consideration of the petition by the Supreme Court, the body which has authority itself by its own act to give the relief sought, makes the proceeding adversary in the sense of a true case or controversy.**"

A well-considered case closely similar in its facts, in that the proceedings were conducted by others than the parties of record, is *Craig v. Craig*, 110 Kansas 13, 202 Pac. 594. The District Court had awarded the plaintiff a divorce and the restoration of all property owned by her at the time of the marriage. Pending an appeal to the Supreme Court she executed a will devising her property to various persons, not including the defendant-appellant, her former husband. Her health then failed and she became mentally incompetent. When in this condition, the appellant (her former husband) induced her to destroy the will and to sign a stipulation that the Supreme Court should reverse the divorce decree. On filing the stipulation an order of reversal was entered "as a matter of course." Shortly afterwards the plaintiff died and a motion to set aside the order of reversal on the ground of fraud was brought in the Supreme Court by parties not of record but who would have taken under the will and whose property rights were adversely

affected by the order of reversal. The Supreme Court of Kansas said:

> "If these matters [the allegations of fraud] are true, the lapse of a few months' time, or even the lapse of the term at which the order of reversal was fraudulently procured, cannot stay the court's hands to correct them. (*McIntosh v. Comm'rs of Crawford Co.*, 13 Kan. 171.) Happily the practice of fraud on this court has been so rare—indeed the like of this has never occurred—that the legislature has not prescribed any specific code rule to deal with it.
>
> * * * * *
>
> "But the power of this court to set aside an order which it has been induced to make by the fraud of a litigant is inherent; it does not depend on legislation.
>
> "**With entire propriety, so gross an offense against the due administration of justice may be called to our attention by a motion of parties affected by the fraudulent procurement of the judgment of reversal.** . . . The argument that there is no case here, and that the court has lost jurisdiction, entirely overlooks the alleged fraudulent procurement of the order reversing the judgment, through which the appellant got out of court. If the appellant was permitted to depart from this court as a result of his own fraud, the case can and should be reinstated for whatever orders and judgment justice may require.
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> * * * * * *
>
> "The motion is properly filed. It alleged matters which may not be ignored. So far as concerns the appellant, the facts alleged in the motion may stand as denied; or he may plead thereto, as he may be advised. **The motion for the appointment of a commissioner to take testimony and to consider the evidence presented on the matters alleged in the motion, and to report his findings of fact thereon, is allowed.**"
>
> *

Thereafter proofs were taken before the Commissioner who rendered his report finding fraud. On the hearing the Court reaffirmed its jurisdiction, adopted the findings of the Commissioner, and set aside the order of reversal. *Craig v. Craig*, 112 Kans. 472, 212 Pac. 72.

To the same effect is *Trumpler v. Trumpler*, 123 Cal. 248, 55 Pac. 1008.

The foregoing cases emphasize that no tenable distinction can be drawn between the instant case and *Hazel-Atlas Co. v. Hartford Empire Co.*, 322 U.S. 238, because in the latter the record defendant was the petitioner, whereas in the former the record defendant remained passive and the petitioners who prosecuted the proceedings were those whose property rights were indirectly affected by the fraudulent decrees. In both cases the constitutional requirement that the court may act only in a case or controversy regularly before it is fully met by the fact that the fraud issue arose in such a case and was contested by adversary parties appearing therein.

VI.

Having Jurisdiction to Conduct the Investigation the Court of Appeals also Had Jurisdiction to Assess the Costs Thereof Against the Guilty Party.

It would seem to be elementary justice that he who bribes a judge should pay for the expenses incurred in uncovering his guilt. Even in circumstances much less aggravated, the courts have enforced the payment of expenses of those appointed to assist them, against the losing party.

In *Ex parte Peterson*, 253 U.S. 300, there came before the District Court an action to recover a balance due for

coal sold and delivered by plaintiff to defendant as shown by a "long schedule." The answer denied that the schedule showed the true state of account between the parties and in response to a bill of particulars the defendant filed schedules upon which he proposed to establish his defense. In this state of the record the District Court appointed an auditor with instructions to make a preliminary investigation as to the facts, to hear witnesses, to examine the accounts and to file a report. The plaintiff thereupon made application to this Court for leave to file a petition for a writ of mandamus and or prohibition to the District Court to stay it from proceeding in the manner proposed on the ground of its asserted lack of power in the premises. In upholding the court's action, this Court held (p. 312) that courts have

> "inherent power to provide themselves with appropriate instruments required for the performance of their duties. . . . This power includes authority to appoint persons unconnected with the court to aid judges in the performance of specific judicial duties, as they may arise in the progress of a cause. From the commencement of our Government, it has been exercised by the federal courts, when sitting in equity, by appointing, either with or without the consent of the parties, special masters, auditors, examiners and commissioners. To take and report testimony; to audit and state accounts; to make computations; to determine, where the facts are complicated and the evidence voluminous, what questions are actually in issue; to hear conflicting evidence and make findings thereon; these are among the purposes for which such aids to the judges have been appointed. *Kimberly v. Arms,* 129 U.S. 512, 523."

This Court next passed to a consideration of whether the court also had power to assess the expenses of the auditor against either or both parties in accordance with

the court's discretion. On the point this Court said *inter alia* (pp. 316-18):

> "The allowance of costs in the federal courts rests not upon express statutory enactment by Congress, but upon usage long continued and confirmed by implication from provisions in many statutes. . . . As there is no statute, federal or state, and no rule of court excluding auditors' fees and the expense of his stenographer from the items taxable as costs, no reason appears why they may not be included, like other expenditures ordered by the court with a view to securing an intelligent consideration of a case.
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> * * * * * * * * *
>
> "While in equity proceedings the allowance and imposition of costs is, unless controlled by statute or rule of court, a matter of discretion, it has been uniformly held that in actions at law the prevailing party is entitled to costs as of right: (compare *United States v. Schurz*, 102 U.S. 378, 407), except in those few cases where by express statutory provision or by established principles costs are denied."

Accordingly it was held that the order was erroneous in declaring that the expense of the auditor should, instead of abiding the result of the action as is the rule in law cases, be paid by either or both parties in the discretion of the judge. Nevertheless the power of the court, even in a law action, to appoint an auditor and to assess his fees and expenses as costs, was upheld by this Court. Obviously, if the court had such power in the case of an auditor in a case at law, it had similar power in the case at bar to appoint the Special Master and *amici curiae* and to assess their fees and expenses against the losing—and guilty—party.

In *Sprague v. Ticonic National Bank et al.*, 307 U.S. 161, this Court upheld "the power of Federal courts in equity suits to allow counsel fees and other expenses en-

tailed by the litigation not included in the ordinary taxable costs recognized by statute." In the course of the opinion it was stated (p. 166):

> "Plainly the foundation for the historic practice of granting reimbursement for the costs of litigation other than the conventional taxable costs is part of the original authority of the chancellor to do equity in a particular situation. . . . As in much else that pertains to equitable jurisdiction, individualization in the exercise of a discretionary power will alone retain equity as a living system and save it from sterility."

The facts in the *Sprague* case are distinguishable from those at bar in that the litigation in effect created a fund in which other parties were interested. However, the later decision of this Court, in *Reconstruction Finance Corporation v. Menihan Corporation, et al.*, 312 U.S. 81, 85-6, recognized the power of courts of equity to make an additional allowance of costs to a party, including attorney's fees, in a case where no fund was involved.

The fact emphasized by petitioner, that there is no exact precedent in either the Federal or Pennsylvania Courts for the allowance of these costs and expenses under the particular circumstances of the case at bar, does not militate against the existence of the inherent power of courts of equity to make such allowances when the facts warrant; it merely reflects a fortunate infrequency of fraud of the type here involved. Certainly no case cited by petitioner is a precedent for denying these expenses, and in the absence of a contrary precedent, the question should be resolved by this Court in accordance with the general principles enunciated in the *Peterson* and *Sprague* cases. Obviously the statutory schedule of costs for courts of appeals (Pet. Br. 46-9) has to do only with

costs incurred in the usual appeals, and has nothing to do with the situation in the case at bar where the inherent power of the Court to tax costs is bound up with its inherent power to protect itself from fraud. Cf. *Ex parte Peterson*, 253 U.S. 300, 314.

It is usually an expensive business to uncover fraud. Perhaps this was not so in the *Hartford* case for there the guilty parties had spread proof of their guilt upon the record so that it would have been entirely fruitless for them to have entered denials. Such direct proof was entirely lacking in the case at bar. No one confessed. All denied their guilt. Moreover, the principal actors in the drama were not dullards of a low criminal type but were men of keen wits, and with the exception of the country farmer Stokley, were well educated and equipped by training and experience to foil the cross-examiner. Laborious efforts extending over a period of three years were required of those appointed as *amici curiae* to examine all the documents and to uncover and untangle the mass of circumstances which, in the end, proved guilt. The cost of these efforts, and also of the Master's fee of $25,000.00, was fortunately defrayed initially by the oil refining companies who were threatened by the *Root* judgments. Hence, the truth came to light, which for lack of funds might otherwise have remained hidden.

Were the courts powerless to tax costs against malefactors of the type here revealed, they would, in most cases, go free. Conversely, recognition and exercise of the power will go far to discourage tampering with justice by that class of litigants to whom ethical considerations are meaningless.

CONCLUSION

As the Court of Appeals had jurisdiction to entertain the proceedings, to vacate its judgments because of petitioner's gross fraud, and to order the assessment of costs and expenses incurred herein against petitioner, the order of the Court of Appeals of December 29, 1944, should be affirmed.

Respectfully submitted,

J. BERNHARD THIESS,
THORLEY VON HOLST,
pro se, and on behalf of
Skelly Oil Company,
Globe Oil & Refining Company (of Illinois),
Eldorado Refining Company,
Globe Oil & Refining Company (of Kansas),
Rock Island Refining Company, and
Anderson Prichard Oil Company.

SIDNEY NEUMAN,
ROBERT W. POORE,
Of Counsel.

APPENDIX

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

UNIVERSAL OIL PRODUCTS COMPANY, *Petitioner,* vs. ROOT REFINING COMPANY, *Respondent.*	Nos. 48 and 64

AFFIDAVIT OF DAVID PHILIP HAMILTON

STATE OF LOUISIANA
PARISH OF CADDO } ss.:

DAVID PHILIP HAMILTON, being first sworn on oath, deposes and says that:

He resides at Shreveport, in the State and Parish aforesaid, and is the President of Root Petroleum Company, formerly the Root Refining Company (hereinafter called "Root"), by which latter name it has been designated as a respondent in the proceedings in the Supreme Court of the United States entitled *"Universal Oil Products Company, Petitioner v. Root Refining Company, Respondent,"* Nos. 48 and 64, October, 1945, Term."

Following the adjudication by the Circuit Court of Appeals for the Third Circuit on June 26, 1935, in the original proceedings in the instant case, that the Dubbs and Egloff patents were valid and infringed, and while the

accounting awarded to Universal Oil Products Company (hereinafter called "Universal") was in progress, Root applied for, and obtained, leave from the Court of Appeals to file in the District Court for the District of Delaware a Bill in the Nature of a Bill of Review and for Rehearing presenting certain newly discovered evidence. The Motion for leave to file Root's Bill was argued in the District Court at Wilmington, Delaware, on January 24, 1939.

On January 25, 1939, Universal and Root, the latter acting through affiant, who was then in New York, entered into a contract of settlement whereby Root took a license under all patents owned by Universal, and the latter discharged in full Root's liability for past infringement of the Dubbs and Egloff patents in suit, in consideration of certain payments to be made by Root. Annexed hereto, marked Exhibit "A," and expressly made a part hereof, is a copy of this contract.

Although said contract was dated as of April 1, 1939, it was actually executed on the evening of January 25, 1939. It provided in paragraph 2 that Universal would "promptly cause to be dismissed the suits" pending against Root (meaning the original proceedings in the instant case), and that Root would dismiss its Bill in the Nature of a Bill of Review and for Rehearing.

It was also agreed by Root and Universal that a "final decree of dismissal" substantially in the form of a decree attached to the contract would be entered in the suits.

This contract was promptly changed before any steps were taken to carry it into effect and before the form of decree of dismissal which was to be made a part of the contract had been drawn.

On the morning of January 26, 1939, affiant, who was still in New York, received a telephone call from W. M. Behrens, Esq., the Secretary of Universal, and was advised by Mr. Behrens that Universal's attorneys had requested a modification of paragraph 2 of the contract because the contract as executed would have an effect upon the case entitled *"Universal Oil Products Company v. Globe Oil & Refining Company"* then pending in the United States District Court for the Northern District of Illinois, wherein Universal was contending that the Globe Company was bound under the rule of *res judicata* by the decree in the *Root* case and that, therefore, Universal's attorneys desired to hold the dismissal of the *Root* case in suspension until after the *res judicata* issue in the *Globe* case had been disposed of.

Affiant agreed with Mr. Behrens that paragraph 2 of the contract could be eliminated and the case held in suspense, indefinitely or until it was agreed by Root and Universal that final action would be taken. Accordingly, there was immediately prepared and executed by Root and Universal on January 26, 1939, a supplementary letter of agreement which modified paragraph 2 of the original contract so as to set forth the new understanding that nothing would be done, in so far as the dismissal of the *Root* cases was concerned, until agreed upon by Root and Universal. Annexed hereto, marked Exhibit "B," and expressly made a part hereof, is a copy of this Supplementary Letter of Agreement.

The only steps which were taken by the parties pursuant to these agreements were:

(a) Root withdrew its motion for leave to file its Bill of Review and for Rehearing; and

(b) Root moved for, and obtained, an Order in the District Court which

(1) vacated the order of reference to a special master;

(2) provided that no accounting be taken of profits and damages;

(3) discharged a supersedeas bond furnished by Root; and

(4) released to Root certain moneys which had been placed in trust by Root to further secure said supersedeas.

No decree of dismissal was entered in the District Court, and the instant cases against Root have remained undisposed of in the District Court to the date of the making of this affidavit.

In January, 1939, when the contracts Exhibits "A" and "B" annexed hereto were made and executed as aforesaid, affiant had no knowledge of any of the facts and circumstances upon the basis of which the Circuit Court of Appeals for the Third Circuit found that its judgments entered in the *Root* cases on June 26, 1935, were tainted with fraud and corruption. So far as affiant is aware, no other official, officer, or agent of Root had knowledge of these facts and circumstances.

On August 3, 1944, following the Order of the Court of Appeals for the Third Circuit entered on June 15, 1944, which vacated the judgments of June 26, 1935, and directed the Clerk of the Court to restore the *Root* cases to the argument list of that court, Root and Universal entered into a contract and again agreed to settle all differences between them. By this contract Universal agreed to repay to Root the sum of $32,298.38, which had been paid by Root to Universal pursuant to the settlement agreement of April 1, 1939, on account of Root's liability to Universal for past infringement under the decrees in

the instant case. Universal was permitted to retain the sum of $69,819.06, which had been paid by Root on account of the license agreement which had been entered into as of April 1, 1939. The settlement agreement of April 1, 1939, was terminated, and Universal released Root from all claims and demands which had arisen in favor of Universal under the agreements which had been entered into as of April 1, 1939, including an accrued royalty liability on the part of Root of approximately $317,000.00. In consideration of Universal's agreements and releases, Root released Universal of all claims which Root had against Universal.

In this agreement it was provided that the decrees entered in the *Root* cases should be vacated and that the Bills of Complaint filed in those cases should be dismissed. However, no steps have been taken by either party to effect the vacation of the decrees and the dismissal of the suits. Annexed hereto, marked Exhibit "C," and expressly made a part hereof, is a copy of the contract last described.

DAVID PHILIP HAMILTON.

Subscribed and Sworn to before me this 12th day of September, 1945.

THOMAS E. BEAIRD,
Notary Public.

My commission expires November 19, 1949.

EXHIBIT A

AGREEMENT, dated as of the first day of April, 1939, between UNIVERSAL OIL PRODUCTS COMPANY, a Delaware corporation, hereinafter referred to

as UNIVERSAL OF DELAWARE, UNIVERSAL OIL PRODUCTS COMPANY, a South Dakota corporation, hereinafter referred to as UNIVERSAL OF SOUTH DAKOTA, and ROOT PETROLEUM COMPANY, a Delaware corporation, hereinafter referred to as ROOT.

In consideration of the execution and delivery of a license agreement between UNIVERSAL OF DELAWARE and ROOT, dated as of April 1, 1939, and of the premises and for other good and valuable considerations, receipt whereof by each of the parties is hereby acknowledged, the parties agree as follows:

1. UNIVERSAL OF SOUTH DAKOTA and UNIVERSAL OF DELAWARE hereby release ROOT from all claims for past infringement of their respective pyrolytic cracking patent rights for ROOT'S pyrolytic cracking operations at Eldorado, Arkansas.

2. UNIVERSAL OF SOUTH DAKOTA and UNIVERSAL OF DELAWARE shall promptly cause to be dismissed the suits presently pending in the United States District Court for the District of Delaware, entitled Universal Oil Products Company vs. Winkler-Koch Engineering Company and Root Petroleum Company (formerly Root Refining Company) in equity Nos. 716 and 895, and ROOT shall promptly cause to be dismissed its Bill in the Nature of a Bill of Review and for Rehearing, as Amended, and its Petition to apply to the District Court for the District of Delaware for leave to file such Bill in such suits, each party to bear its own costs therein. It is agreed between the parties that a final decree of dismissal shall be entered in the above entitled suits substantially in the form of the final decree attached hereto and made a part hereof.

3. It is represented by UNIVERSAL OF DELAWARE that it has an agreement with The Texas Company, dated as of July 29, 1937, a copy of the pertinent provisions of which said agreement is attached hereto and made a part of this agreement, showing the extent of, and restrictions on, the rights of UNIVERSAL OF DELAWARE in said agreement of July 29, 1937, and UNIVERSAL OF DELAWARE will, to the full extent of its authority under said agreement, grant to ROOT the immunities, releases and rights possessed by UNIVERSAL OF DELAWARE in accordance with the terms and conditions of said agreement, dated as of July 29, 1937.

4. ROOT hereby sells, assigns, transfers and sets over to UNIVERSAL its entire right, title and interest in and to the Letters Patent and the pending applications for Letters Patent listed in the schedule attached hereto and made a part of this agreement, together with the right to recover for all past infringement of said Letters Patent, but ROOT reserves to itself for its own use unlimited rights under such Letters Patent and such application for Letters Patent without accounting to UNIVERSAL therefor.

5. Each of the parties covenants that when requested by the other, it will execute and deliver or cause to be executed and delivered, such further documents as may be necessary to carry into effect the provisions of this agreement.

IN WITNESS WHEREOF, the parties hereto have caused their respective corporate names to be hereto subscribed and their respective corporate seals to be here-

unto affixed and attested by their respective officers and agents thereunto duly authorized.

In Triplicate.

UNIVERSAL OIL PRODUCTS COMPANY
(South Dakota)

By H. J. HALLE
President

UNIVERSAL OIL PRODUCTS COMPANY
(Delaware)

By H. J. HALLE
President

ROOT PETROLEUM COMPANY
By D. P. HAMILTON
President

ATTEST:
W. M. BEHRENS
Secretary

ATTEST:
W. M. BEHRENS
Secretary

ATTEST:
T. E. BEAIRD
Secretary

AGREEMENT, dated as of July 29, 1937, between THE TEXAS COMPANY, a Delaware corporation, acting on behalf of itself, its parent, The Texas Corporation, a Delaware corporation, and the subsidiaries of The Texas Corporation, hereinafter collectively referred to as TEXAS, and UNIVERSAL OIL PRODUCTS COMPANY, a Delaware corporation, acting on behalf of itself and its subsidiaries, hereinafter collectively referred to as UNIVERSAL.

For and in consideration of One Dollar ($1.00) and other good and valuable considerations, receipt whereof is hereby acknowledged, TEXAS hereby grants, releases and covenants as follows to and with UNIVERSAL:

1. Whenever used herein, the following terms shall have the following meanings respectively:

The term "patents" shall mean all patents of the United States and all foreign countries (except Japan) and transferable rights thereunder, now or hereafter owned or controlled (in the sense of having the right to grant licenses or immunities thereunder) by the corporation designated and based upon inventions made prior to July 1, 1947.

The terms "cracking patent rights" shall mean all patents covering:

(a) Any pyrolytic cracking process, excluding:

(1) hydrogenation processes,

(2) gas pyrolysis and gas polymerization processes, and

(3) catalytic processes;

(b) Any apparatus for carrying out any such pyrolytic cracking process; or

(c) Any products produced directly by any such pyrolytic cracking process.

The term "hydrogenation processes" shall mean processes involving or not involving pyrolysis but in which the oil is subjected to the action of hydrogen in the presence or absence of a catalyst, to a degree or extent or in a manner to secure definitely determinable hydrogenation.

The term "gas pyrolysis and gas polymerization processes" shall mean processes in which gas, as distinguished

from vaporized oil, is treated for the production of liquid products.

The term "catalytic processes" shall mean processes in which the cracking, measured in terms of the principal product of the process, is predominantly catalytic.

The term "subsidiaries" shall mean all corporations of which the parent company now owns, or shall acquire, directly or indirectly, more than fifty per cent. (50%) of the stock having the right to vote for directors.

For the purpose of the above definition, the stock owned by the parent company shall be deemed to include all stock having the right to vote for directors and owned directly or indirectly by any of its subsidiaries as defined above.

The term "cracking patent rights of TEXAS" shall mean and shall be deemed to include the cracking patent rights of TEXAS, Indiana, Jersey, Atlantic, Gulf and Gasoline.

The term "Gasoline" shall mean Gasoline Products Co., Inc., a Delaware corporation, and its subsidiaries.

The term "Indiana" shall mean Standard Oil Co. (Indiana), an Indiana corporation, and its subsidiaries.

The term "Jersey" shall mean Standard Oil Company, a New Jersey corporation, and/or Standard Oil Development Company, a Delaware corporation, and their respective subsidiaries.

The term "Jersey" shall mean Standard Oil Company, a New Jersey corporation, and/or Standard Oil Development Company, a Delaware corporation, and their respective subsidiaries.

The term "Atlantic" shall mean The Atlantic Refining Company, a Pennsylvania corporation, and its subsidiaries.

The term "Gulf" shall mean Gulf Oil Corporation, a Pennsylvania corporation, and its subsidiaries.

The term "Japan" shall mean all territory to which patents of the Empire of Japan extended on July 29, 1937.

2. TEXAS grants to UNIVERSAL a release from all claims for past infringement and an irrevocable, unlimited, non-exclusive, non-transferable, fully paid license, under the cracking patent rights of TEXAS for the full term of the patents and TEXAS empowers UNIVERSAL to grant releases and sublicenses without accounting to TEXAS under such cracking patent rights for the full term of the patents to any or all of the present licensees of UNIVERSAL, and to any or all of the future licensees of UNIVERSAL, except to any corporation, firm or partnership licensed under any or all of the cracking patent rights of TEXAS in any country prior to July 29, 1937, upon the following conditions:

(I) Should any licensee of UNIVERSAL to which UNIVERSAL shall have granted any release, license or immunity pursuant to the provisions of this agreement bring suit for infringement of such licensee's cracking patent rights against TEXAS, Indiana, Jersey or Gasoline, or against any licensee of any of them, as the result of acts performed by such licensee with the approval of TEXAS, Indiana, Jersey or Gasoline as a part of a unitary pyrolytic cracking operation licensed under any or all of the cracking patent rights of TEXAS, the bringing of such suit shall ipso facto be deemed as to such licensee of UNIVERSAL to have terminated ab initio such release, license or immunity to said licensee of UNIVERSAL under the cracking patent rights of the defendant in such suit; and

(II) The rights hereby granted to UNIVERSAL under the patents covering the inventions of John C. Black are subject to the express conditions that if UNIVERSAL has at the date of this agreement, or shall at any time hereafter become entitled to rights of any character in respect of such patents through, under, or by reason of any license or other rights previously granted in respect of such patents by said John C. Black to Standard Oil Company (California), Pan American Petroleum & Transport Company and or Pan American Petroleum Company, then and in such event all rights granted or purported to be granted to UNIVERSAL by this agreement in respect of such patents shall forthwith and ipso facto terminate, but only to the extent that such rights shall be effective, and that if any licensee of UNIVERSAL has at the date of this agreement, or shall at any time hereafter become entitled to any such rights, then and in such event all such rights granted by this agreement in respect to such patents to such licensee shall forthwith and ipso facto terminate, but only to the extent that such rights shall be effective.

EXHIBIT B

January 25, 1939

Universal Oil Products Company (Delaware)
Universal Oil Products Company (South Dakota)
50 West 50th Street
New York, New York.

Dear Sirs:

In connection with the Agreement of Settlement dated as of the first day of April, 1939, being negotiated between your Companies and Root Petroleum Company, a Delaware corporation, we hereby agree that paragraph 2 of such Agreement of Settlement shall be modified to read as follows:

2. ROOT shall promptly cause to be dismissed its Bill in the Nature of a Bill of Review and for Rehearing, as Amended, and its Petition to apply to the District Court for the District of Delaware for leave to file such Bill in the suits presently pending in the United States District Court for the District of Delaware, entitled Universal Oil Products Company vs. Winkler-Koch Engineering Company and Root Petroleum Company (formerly Root Refining Company) in equity Nos. 716 and 895, and upon written request of Root, Universal of Delaware shall promptly take any and all steps and do any and all acts necessary or appropriate to enable Root to obtain an Order cancelling the Supersedeas Bond posted in such suits and releasing the moneys and the mortgage deposited in escrow by Root as security for such Bond. Neither Root nor Universal of Delaware shall take any further action or proceeding in such suits of any kind or nature whatsoever without first obtaining the written consent thereto of the other, and all proceedings, other than those referred to in the first sentence of this paragraph, heretofore had in such suits or either of them shall remain unaffected by this Agreement.

Yours very truly, (SEAL)

ROOT PETROLEUM COMPANY
By D. P. HAMILTON
Pres.

ATTEST:
T. E. BEAIRD
Secretary

We hereby consent to the above modification of the said Agreement of Settlement.

UNIVERSAL OIL PRODUCTS COMPANY
(Delaware)
By H. J. HALLE
President

ATTEST:
W. M. BEHRENS
Secretary

UNIVERSAL OIL PRODUCTS COMPANY
(South Dakota)
By H. J. HALEE
President

ATTEST:
W. M. BEHRENS
Secretary

EXHIBIT C

AGREEMENT

between

ROOT PETROLEUM COMPANY
(formerly Root Refining Company)
and
UNIVERSAL OIL PRODUCTS COMPANY

Dated: July 28, 1944

AGREEMENT dated July 28, 1944 between ROOT PETROLEUM COMPANY (formerly Root Refining Company), a Delaware corporation (hereinafter called "Root"), and UNIVERSAL OIL PRODUCTS COMPANY, a Delaware corporation (hereinafter called "Universal");

WITNESSETH:

1. Root and Universal entered into a License Agreement dated April 1, 1939 for pyrolytic cracking of hydrocarbons by Root under Universal's patents, which Agreement expired on March 31, 1944.

2. By Settlement Agreement dated April 1, 1939, as modified by agreement as of April 1, 1939, signed by

niversal Oil Products Company, a South Dakota cor-
ration, as well as by Universal, Universal released the
nd of Root filed with the District Court of the United
ates for the District of Delaware in the suits of *Uni-
rsal Oil Products Company vs. Winkler-Koch Engi-
ering Company and Root Refining Company*, Nos. 716
d 895 in Equity, in which suits judgment for the
aintiff for infringement of certain of its patents was
ndered by said District Court and affirmed by the Cir-
it Court of Appeals for the Third Circuit. Since such
firmance said Circuit Court of Appeals for the Third
ircuit in a proceeding entitled *Root Refining Company
. Universal Oil Products Company*, Nos. 5546 and
48, set aside its judgment of affirmance and directed
reargument of such appeal.

3. Neither of the parties hereto desires to continue
ch litigation and, regardless of their respective claims
infringement anf non-infringement, have agreed to
ttle the differences between them as follows:

(a) There has been paid by Root to Universal on account of said Settlement Agreement the sum of $32,298.38 and on account of said License Agreement the sum of $69,819.06. Universal agrees to repay to Root forthwith the said sum of $32,298.38 and Root agrees that Universal may retain the said sum of $69,819.06, and it is agreed that said Settlement Agreement is herewith terminated.

(b) In consideration of the foregoing:

Root releases Universal from any and all claims of every nature and kind whatsoever, either in law or in equity, from the beginning of the world to the date of these presents.

Universal releases Root from any and all claims and demands whatsoever, either in law or in equity, arising out of any infringement or alleged infringe-

ment of Universal's patents for the pyrolytic cracking of hydro-carbons or arising out of the infringement or alleged infringement of patents of others involving pyrolytic cracking, to the extent that Universal may legally do so (including specifically, but without in any way limiting the generality of this release, the said judgment obtained by Universal against Root in said District Court of the United States for the District of Delaware), from the beginning of the world to the date of these presents.

Universal also releases Root from any and all claims and demands whatsoever, either in law or in equity, arising from the above described agreements entered into by the parties hereto as of April 1, 1939, as amended, from the beginning of the world to the date of these presents.

Universal also grants immunities to Root for pyrolytic cracking of hydrocarbons by Root in its existing cracking plant or in any pyrolytic cracking plant of the same type of operation replacing the same, under Universal's presently existing patents, as well as the presently existing patents of others to the extent that Universal may legally do so.

The parties hereto agree (a) that the decree of the District Court of the United States for the District of Delaware, entered in the suit entitled *Universal Oil Products Company vs. Winkler-Koch Engineering Company and Root Refining Company*, Nos. 716 and 895, shall be vacated, (b) that the bills of complaint filed in said suit shall be dismissed, and (c) that either party may cause an order or orders to be entered, or do whatever otherwise may be necessary or advisable to effect the foregoing without further notice to the other.

This agreement shall inure to the benefit of and be binding upon the successors and assigns of the parties hereto. This agreement may be executed in one or more

counterparts which, together, shall constitute this agreement.

IN WITNESS WHEREOF, the undersigned have caused this agreement to be executed by their proper officers thereunto duly authorized.

ROOT PETROLEUM COMPANY
By D. P. HAMILTON
President

ATTEST:
T. E. BEAIRD
Secretary

UNIVERSAL OIL PRODUCTS COMPANY
By J. G. ALTHER
Vice President

ATTEST:
W. M. BEHRENS
Secretary